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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

Frank John Black and Catherine Isaacs Black,
Petitioners,

-versus-

United States of America,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FORWRIT OF CERTIORARI

Elmer J. George
Kandice D. Engle
Counsel for Petitioners
105 West Main Street
Lebanon, KY 40033
(270) 692-2161

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120 pp

QUESTIONS PRESENTED

I. **The circuits are divided on the issues presented.**

II. **The appellate panel authored two completely inconsistent opinions in this case. Those opinions should be clarified by this Court.**

III. **The trial court's restrictive definition of driveway is untenable. This is an issue of first impression that should be addressed by the Nation's Highest Court.**

IV. **The *Franks* issues below were resolved incorrectly, giving a stamp of approval to continued misconduct.**

V. **The Writ should issue based upon this Court's decision in *Kyllo v. United States*.**

PARTIES TO THE PROCEEDINGS

Petitioners

Frank John Black and Catherine Isaacs Black, husband and wife, are the Petitioners herein.

Respondent

The United States of America is the Respondent governmental authority herein.

Other Parties

There are no other parties to this action.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Location of the rural residence 2

B. The police investigation 6

C. The nature and course of proceedings 8

REASONS FOR GRANTING THE WRIT 10

I. The circuits are divided on the issues presented. 10

II. The appellate panel authored two completely inconsistent opinions in this case. Those opinions should be clarified by this Court. 12

III. The trial court's restrictive definition of driveway is untenable. This is an issue of first impression that should be addressed by the Nation's Highest Court . 14

IV. The *Franks* issues below were resolved incorrectly, giving a stamp of approval to continued misconduct. 19

a. False averment: Informant obtained marijuana directly; first hand knowledge. 19
b. False averment: Officers smell marijuana 23
c. False averment: Officers see marijuana. 26
d. False averments by others. 28

V. The Writ should issue based upon this Court's decision in *Kyllo v. United States*. 30

CONCLUSION 30

APPENDIX A-01

Per Curiam Opinion Affirming A-01
Wellford, Concurring A-15

Moore, Concurring A-21

Opinion and Order A-22

Per Curiam Opinion Vacating Remanding A-48

Memorandum Opinion A-64

TABLE OF AUTHORITIES

Cases	Page No.
California v. Ciraolo, 476 U.S. 207, 213 (1986)	16
Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998)	11
Franks v. Delaware, 438 U.S. 154 (1978)	09, 19, 23, 28, 29
Kyllo v. United States, ___ S.Ct. _____, No. 99-8508 (2001)	30
United States v. Daoust, 916 F.2d 757 (1st Cir. 1990)	12
United States v. Depew, 8 F.3d 1424 (9th Cir. 1993)	10
United States v. Dunn, 480 U.S. 294 (1987)	10, 18
United States v. Humphries, 636 F.2d 1172 (9th Cir. 1980)	11
United States v. Jenkins, 124 F. 3d 768, *reh'g & sugg for reh'g en banc denied* (6th Cir. 1997)	11,18
United States v. Magana, 512 F.2d 1169 (9th Cir. 1975)	11
United States v. Mejia,	

Frank John Black and Catherine Isaacs Black respectfully request that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (following remand) on the merits is unreported and is reproduced at App. at A-1 – A-21. The opinion and order of the United States District Court for the Eastern District of Kentucky on remand is unreported and is reproduced at A-22 – A-46. The initial decision of the court of appeals (remanding) is unreported and is reproduced at A-48 – A-63. The original opinion and order of the district court is unreported and is reproduced at A-64 – A-84.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered and entered on April 18, 2001. This judgment has not been revised but, despite request of the Respondent, has been denied publication. No petition for rehearing was filed before the court of appeals. This Court has jurisdiction under 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, for protection of its citizens from unreasonable searches. U.S. Const. Amend. IV.

STATEMENT OF THE CASE

A. The location of the rural residence

Petitioners' property is an eighty (80) acre farm located at the end of Chestnut Grove Road in very rural Parksville, Boyle County, Kentucky. The topography is heavily wooded knobland with bluff-like, steeply sloped drop-offs along each side and the back side.

The area is clearly secluded and remote: the residence is the last residence off of Chestnut Grove Road and sits atop a steep knob ridge, back a long curved driveway. Immediately adjacent to the home is a carport. Forty feet from the residence (with the carport in between) is a small one-story wood shed. Forty (40) feet diagonally from the center post of the carport is a two-story block building. A third outbuilding, another one-story wood shed, completes the entourage.

The residence and grouping of three sheds are

surrounded by a natural enclosure of dense vegetation and the entire residential premises is blocked from visibility by a thick tree line on either side of the premises. The house and the tremendous sycamore tree to its right block the view from the length of the driveway to the sheds and carport behind the house.

The lawn is neatly mown. The rural residence and curtilage are clearly distinguishable from the surrounding open fields. The Blacks relish the privacy provided by the location of their home.

The enclosed area is put to classically intimate uses: laundry is washed in the block building and hung to dry on the clothesline beside the wooden shed; the couple shower in the block building; they grill food near the wooden shed; and, they store food and beverages in the refrigerator on the back porch and in the block building. At one time, the Blacks actually lived in the wooden shed.

The sheds had each been carefully altered by the Blacks to block detection of the contents. The wooden shed was wrapped on three exterior sides with tin horizontally over top of the vertical wooden slats constituting the shed.. The inside was layered with foam rubber in all crevices and

corners and the flat surfaces were covered with Celotex insulation boards. Fans were placed in each shed to eliminate heat density and, thus, to ventilate the sheds. The block building possessed a window which had been covered with Celotex and duct tape . Each door to the sheds was locked by a padlock to prevent entry. The Blacks inspected the secrecy of their operation every time they exited the premises for any reason -- at least three times per week.

The marijuana inside the shed was placed two feet from the interior walls and five feet from the front door to permit rotation of the boxes in which the plants were growing and access to water and tend the plants. The Blacks kept a wide variety of supplies and other items stored in the front right hand corner of the shed: a laundry sink, flower pots, a flannel shirt/jacket, a chair, a tape measure, plastic, foam rubber, buckets, a toothbrush holder and glass, along with various other items. Each of these facts was further solidified by exhibiting the police video taken from without and within the shed and demonstrating from photographs taken by the police during the search and seizure on June 12, 1997.

The gravel drive passes through private property and ends at a fence and gate with a sign marked "Tree Farm"

indicating the beginning of Petitioners' property. There are "No Trespassing" signs along the gravel drive beginning at neighbor David Stephens' property.

The gravel driveway providing access to the Blacks' residence ends at an electric fence immediately to the rear of the wooden shed and two-story block outbuilding behind the Blacks' residence. Behind this fence lies a fallow field used for grazing dairy cattle. This field contains a pathway consisting of "two old ruts," created by logging in years past.

Billy May owns a very rough tract of land, landlocked behind the Black property but had not accessed that property in more than three years. Petitioners maintain and mow May's property for him to eliminate the need for access.

Several tenths of a mile before reaching the Black's property line, the county ceases maintenance, the post office service ends, newspaper delivery ceases, and the residents are individually responsible for maintaining the gravel road. Chestnut Grove continues through two neighboring properties and ends at the entrance to the Black property. This portion of Chestnut Grove Road [from the end of pavement to the Black property entrance] is maintained by the individual residents and each owns one-half of the road according to the

legal descriptions contained in their deeds. The Black deed does not mention Chestnut Grove Road because the road ends at the Blacks' property entrance — where, logically, their driveway begins. The court admits in its Opinion and Order that no one else owns this portion of the gravel passageway.

The Blacks enter and exit their rural premises using this gravel passageway. They park the Chrysler car and a John Deere tractor under the carport . They park their truck in the gravel passageway which they consider to be their driveway. The local sheriff testified that this area has been blocked off every time he has arrived on the premises in years past — at times by a truck parked in the driveway. The videos shown to the Court reflect vehicles parked in this area of the gravel passageway. These are the typical uses of the gravel area which the court labels a road and the Blacks call a driveway.

B. The police investigation

In June, 1997, officers of the Kentucky State Police DeSI-East task force were conducting an investigation of indoor cannabis operations in Boyle County, Kentucky. During that investigation, a suspect, later identified as Jason Stevens, provided the following information to Detective

Mark Cool: Stevens informed Cool that he had smoked marijuana with an unnamed third person who told Stevens that he [the third party] had obtained marijuana from a John and Kathy in the Tank Pond Road area. Cool then improved that tip when he included it in his affidavit so that it appeared to be first-hand knowledge from an identified informant, Stevens himself: "he [Stevens] had obtained marijuana from a residence located in the Tank Pond R[oa]d Area from individuals known to him only as "John & Kathy" and stated they were growing marijuana indoors at their property."[1]

Based upon this information, Cool then contacted Boyle Sheriff Karl Lutrell and KSP Trpr. George Canter. Lutrell advised that he had received "complaints" about John and Kathy Black cultivating marijuana and verified their address on Chestnut Grove Road near Tank Pond Road. Canter advised that he, too, had received "complaints" of John and Kathy Black cultivating marijuana. Cool then contacted KSP Detective Rick Ledford who advised that DEA records indicated "*a* Kathy Black" had previously purchased equipment used in the manufacture of marijuana. Neither Ledford nor Cool specified what type of equipment or how

[1]Affidavit for Search Warrant.

they knew to associate the equipment with marijuana.

On June 11, 1997, Cool dispatched other law enforcement officers to the Black residence. There they conducted a thermal imaging scan perched atop the window sill of the cruiser. The infrared scan detected abnormal heat signatures only on the out-buildings located behind the Black residence. Officers secured the scene until a search warrant was obtained. Based upon the information Cool presented in his affidavit, he obtained a search warrant from the state circuit court judge. While executing the search warrant, officers discovered 620 marijuana plants constituting an "indoor grow" operation inside two of the out-buildings on the Black property.

C. The nature and course of proceedings

Petitioners seek review of the judgment of the Court of Appeals for the Sixth Circuit, affirming their convictions in the district court for the Eastern District of Kentucky under 21 U.S.C. §§ 841(a)(1), 846 for conspiring to manufacture marijuana and possession of marijuana with intent to distribute. The district court for the Eastern District of Kentucky was the court of first instance and has exclusive original subject matter jurisdiction under 18 U.S.C. §3231.

Initially, the Blacks faced charges in state district court. However, following a preliminary hearing in state court, the matter was deferred to federal court pursuant to a three-count indictment returned by the federal grand jury.

Blacks challenged the search and seizure of items from their residence and curtilage in violation of the Fourth Amendment. When Petitioners appeared for a hearing, they were summarily denied any evidentiary hearing because the court ruled Petitioners failed to make the requisite showing for a *Franks* hearing. Petitioners then entered conditional pleas of guilty. The Sixth Circuit first remanded the case to the district court finding that Petitioners succeeded in making a substantial preliminary showing under *Franks* and that the district court erred in denying an evidentiary hearing on the other motions to suppress as well.

Despite the district court's unequivocal disdain for the proceedings on remand, Petitioners presented evidence in support of their motions. The district court again denied Petitioners' motions and Petitioners appealed anew to the Sixth Circuit. On appeal, the Sixth Circuit rejected Petitioners' argument against the use of the thermal imager and found that the affidavit for search warrant contained

sufficient probable cause absent the thermal imager survey.

REASONS FOR REVIEW

I. The circuits are divided on the issues presented.

The circuits of this nation are divided on the issues presented when applying the principles of *United States v. Dunn*, 480 U.S. 294 (1987), to define curtilage in factually similar cases involving rural residential areas and driveways. The Second Circuit found a cottage located 375 feet from the residence to be curtilage given the intimate uses to which the area was put (as with Black's sheds in their back yard) and the lack of visibility due to tree lines (as with the Black's entire residence and surrounding land). *United States v. Reilly*, 76 F.3d 1271, *on reh'g* 91 F.3d 33 (2nd Cir. 1996). The Ninth Circuit found that the area was curtilage where the officer entered the defendant's property without a warrant, traveling down a long curved driveway on secluded premises (identical to the factual setting of the Black premises). The Ninth Circuit suppressed the evidence because the warrant information was obtained after the officer entered the driveway/curtilage area. *United States v. Depew*, 8 F.3d 1424 (9th Cir. 1993).

The Sixth Circuit's previous decisions appeared to follow this same logic in direct conflict with the decision rendered herein. In *United States v. Jenkins*, 124 F.3d 768, *reh'g and sugg for reh'g en banc denied* (6th Cir. 1997), the Sixth Circuit described a rural premises incredibly similar to

the Black property and opined that no artificial enclosure was required to establish curtilage in a rural, secluded setting surrounded by a natural enclosure of vegetation and trees. In *Daughenbaugh v. City of Tiffin*, 150 F.3d 594 (6th Cir. 1998), the Sixth Circuit reached a similar conclusion concerning a dilapidated shed based upon the intimate uses and the distance to the residence.

However, the Sixth Circuit appears to have reverted to its prior position that there is no obstruction to proceeding directly up the driveway to a residence to conduct further exploration and observation under the plain view theory, ameliorating the first prong of the plain view doctrine that the officer is required to be lawfully upon premises from which he accomplishes the "view." *United States v. Smith*, 783 F.2d 648 (6th Cir. 1986).

Other circuits have also addressed the driveway-as-curtilage issue in similar scenarios and found that the driveway was not protected despite isolation or seclusion from public view. *United States v. Ventling*, 678 F.2d 63 (8th Cir. 1982); *United States v. Humphries*, 636 F.2d 1172 (9th Cir. 1980); *United States v. Magana*, 512 F.2d 1169 (9th Cir. 1975) [creating the legal fiction of a semiprivate area prior to the issuance of *Dunn*]; and *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990).

The driveway and backyard are considered private property by the citizens of this nation and should be protected from police intrusion without the constitutionally requisite

search warrant or probable cause. This Court should accept certiorari in this case in order to pronounce those areas protected from unwarranted police intrusion.

II. **The appellate panel authored two completely inconsistent opinions in this case. Those opinions should be clarified by this Court.**

The honorable panel which entertained petitioners' appeal issued contradictory opinions during the course of the proceedings. The initial opinion reversing the district court and remanding for the conduct of an evidentiary hearing utilized sound and authority-based reasoning completely omitted from the second opinion entered after the second appeal to the Sixth Circuit.

The initial opinion required an evidentiary hearing on the motions to suppress reasoning that an evidentiary hearing was required where the movant "set forth contested issues of fact that bear upon the legality of the search", unless "sufficient content remains [in the warrant] to support a finding of probable cause after the contested items are set aside." Wellford, Concurrence, at A-53, *citing United States v. Mejia*, 69 F.3d 309, 318 (9th Cir. 1995).

Yet, the ultimate finding of the district court adopted and affirmed by the Sixth Circuit during the most recent appeal was that even despite the contested issues, the warrant affidavit contained sufficient content to warrant a finding of probable cause. This finding is particularly problematic given the specific content of the initial Sixth Circuit Opinion

reversing where that opinion addresses, at length, the particular factual issues involved in petitioners' suppression motion.

In his concurrence to the original Opinion, the Honorable Judge Wellford sagely wrote:

> "[Cool] was not able to give a time when [Jason] Stephens allegedly purchased the marijuana, nor exactly where he purchased it. Other purported information about defendants came from unidentified and non-specific 'complaints' received about defendants' marijuana activities. [FN 1: One of the law enforcement sources said he had "heard Cathy Black was involved in producing marijuana." Cool had hearsay knowledge from other police, based on "rumors or complaints," but "no evidence that [defendants] had done anything," except the asserted information from Stephens.]
> Wellford, Concurring opinion at A-58 – A-59.

Yet, when the case reached the panel again on remand, the panel unanimously concluded, in three separate opinions, one by each panel member, that the affidavit absent the thermal scan and the observations from within the driveway, contained sufficient probable cause. The affidavit, *sans* thermal scan results and observations made by officers from within the curtilage, contained only the "unidentified and non-specific 'complaints and rumors'" which the honorable Judge Wellford isolated in his concurring opinion to the original

Sixth Circuit Opinion. These two rulings on the same facts and issues cannot be reconciled.

III. The trial court's restrictive definition of driveway is untenable. This is an issue of first impression that should be addressed by the Nation's Highest Court.

The trial court defined the Blacks' driveway as the very small amount of graveled passageway directly in front of the carport. The court looked to a dictionary definition of "driveway" which requires a structure, either a garage, carport or home, at the end of a passageway. This definition is not practical in the setting of rural Kentucky where this writer could provide the court with countless examples of private driveways that do not end at a structure of any kind.

Furthermore, the court's factual findings were clearly erroneous. The Blacks' driveway actually leads to four structures: the carport and residence, the wooden shed and a block building.

The trial court further based its logic on the fact that if the Blacks intended to use what the court calls "Chestnut Grove" as a driveway, they would build their carport on it and park their cars in the driveway. The Blacks did park their cars and the cars of guests on this driveway. The court failed to notice that cars are parked in this area in each video —

whether day or night; whether created by defendants or created by law enforcement.

Secondly, the court also failed to note the testimony of the many witnesses who observed vehicles parked on this area of the gravel drive on various occasions.

The Black deed makes clear that they — and no one else — own this gravel passageway onto their land. If the Blacks use this gravel strip as a driveway, their guests use it as a driveway, and they call it their driveway, it is, in fact and in truth, their driveway. ***Prior*** to the word "driveway" becoming an issue at the suppression hearing, the witnesses testifying consistently referred to the entire gravel passageway from the dilapidated barn at the entrance of the Black property through to the electric fence as the Blacks' driveway — including law enforcement officers!

The district court disregarded every piece of testimony elicited -- and every visual exhibit introduced by either party - about the nature of the driveway, the terrain of this area of rural Boyle County, and the nature of the uses of the area, instead, relying upon a dictionary definition of driveway to decide the lawfulness of the warrantless entry into the Blacks' curtilage.

The court requested and received case law specifically directed toward the determination of whether the driveway constituted "curtilage" for purposes of this Fourth Amendment inquiry. The lower courts then chose to ignore the tenets of the research submitted and decide the issue based upon a dictionary definition of a driveway which, as set forth earlier, does not comport with common rural practice. Whatever the lower courts wish to call the Blacks' driveway, it is not by any stretch of the imagination a "public concourse" from which officers have unfettered observation without violating the Fourth Amendment protections. *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

The Blacks clearly established a subjective expectation of privacy in this area of their residential premises. That expectation is one that society would consider reasonable.

In the instant case, the officers came much further into the curtilage area than 50-60 feet away from the house. Officers admit that they were directly behind the house in the gravel area directly in front of the carport when they smelled and saw marijuana from their vehicle. It was at this location that officers conducted the thermal imager scan — also from

within the curtilage of the residence. All significant independent investigation used in the affidavit for search warrant was obtained from this vantage point inside the Blacks' curtilage. As a result, the evidence must be suppressed.

The officers in this case were in a constitutionally protected area a few feet from the Blacks' back door. This area was clearly used for intimate purposes and the view from anywhere off of the property was largely, if not completely, blocked by the tree line and steep topography of the land.

Mandating that an individual "expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable searches is not required by the constitution" --natural boundaries will suffice. *Williams v. Garrett*, 772 F.Supp. 254, 261 (W.D.Va. 1989).

"Visual inspection from a lawful vantage point . . . is quite different from the physical assault on [the Black]s' backyard that occurred in this case." *U.S. v. Jenkins*, 124 F.3d at 773. Officers were directly behind the home in the Blacks' driveway, nearly in their carport when they made these observations and conducted the thermal imaging survey.

The United States Supreme Court has focused its

inquiry concerning the extent of curtilage upon "factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself" — i.e., the *Dunn* four-factor analysis. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

Had either the trial court or the court of appeals correctly applied the *Dunn* four-factor test to the facts of this case, the courts could not possibly have held that the officers obtained their information from a lawful vantage point outside the curtilage.

The fact that officers claim that they could see into the corner of the wooden shed, does not preclude a successful conclusion of curtilage. In *United States v. Swepston*, 987 F.2d 1510 (10th Cir. 1993), the Tenth Circuit held that the fact that a shed was old, dilapidated and only partially roofed did not prevent its characterization as curtilage given its location in relation to the residence and the association with activities of family life. *U.S. v. Swepston*, 987 F.2d 1519, 1515 (10th Cir. 1993).

IV. The *Franks* issues below were resolved incorrectly, giving a stamp of approval to continued misconduct.

Petitioners challenge the lower courts' rulings that the

Blacks failed to meet their *Franks* burden concerning the falsity of three statements contained in the affidavit for search warrant: (A) misrepresentation of the informant's statements to the affiant; (B) falsity of officers' statements that they smelled marijuana from within their vehicle; and, (C) falsity of officers' statements that they saw marijuana from within their vehicle. The level of proof exacted certainly established by a preponderance of the evidence that the affiant's statements were false, or made with reckless disregard for the truth.

A. False averment: Informant Obtained Marijuana Directly, First Hand Knowledge

Both courts below held that Petitioners failed to meet their burden under *Franks* concerning information attributable to informant Jason Stephens. Detective Cool originally identified Stephens as his informant at the preliminary hearing conducted in Boyle District Court prior to the exertion of federal jurisdiction herein. Cool stated in his affidavit for search warrant:

> " . . . a suspect . . . advised the affiant that he had obtained marijuana from a residence located in the Tank Pond Rd. area from individuals known to him only as 'John +

> Kathy' and stated they were growing marijuana indoors at their property."

At the original suppression hearing, the trial court ruled that Jason Stephens' testimony would not be credible because he was under indictment himself and refused even to hear Mr. Stephens' testimony. On remand, the trial court tolerated Mr. Stephens' testimony. Stephens never told Detective Cool that he had obtained marijuana from John and Kathy or from their residence, as falsely indicated in the affidavit.

Cool interrogated Stephens at his residence immediately after his arrest. Stephens provided no information. Stephens was taken by cruiser to the residence of a friend and fellow suspect. Stephens was detained in the rear of Cool's cruiser for five hours while officers searched the nearby residence. Stephens felt pressured into providing information due to comments Cool made concerning 'making it easier on him' and perhaps preserving his farm. When being interrogated, Stephens told Cool that he had smoked marijuana with ***an unidentified individual*** who told Stephens he got marijuana from somebody named John and Kathy.

Stephens told Cool that he had heard that John and

Kathy had a large indoor grow but he did not identify the source of that information or the last name of "John and Kathy." He testified that he had never been to the Blacks' home. Stephens had ***no*** personal knowledge or information whatsoever concerning an indoor marijuana operation or selling marijuana at the Blacks' home.

The court erroneously held that Stephens' testimony did not prove Cool's affidavit to be false. The trial court reflected that "[t]here is no discernible difference . . . between obtaining marijuana . . . directly from 'John and Kathy' and smoking marijuana with another who obtained it from them. Either way, Jason Stephens possessed marijuana once owned by 'John and Kathy'." The trial court apparently does not consider ***second-hand rumors from an unidentified person*** less credible than direct knowledge; The law does not support this equivalency.

Additionally, and more importantly, the trial court erred in its conclusion that there is no difference between what Cool averred in his affidavit and what Stephens actually told Cool. The statements are significantly different! Cool averred that his informant obtained marijuana directly from the Black residence in the Tank Pond Road area. Cool

averred that his informant told him there was an indoor grow at that residence. These statements surely indicated to the issuing state judge that Cool's informant had ***first-hand knowledge*** that an indoor grow existed, or had existed, at the Black residence.

Cool's affidavit was substantially misleading. The informant had never been to the Black residence, had never personally obtained marijuana from the residence or its occupants, and did not reveal the identity of the person who supplied Stephens with this information.

Cool admitted that he detained Stephens for five hours and that he instructed Stephens he had better be cooperative. Cool did not take notes contemporaneously with nor did he record his interrogation of Stephens. Cool's police report contained significant inconsistencies both from Cool's affidavit statements and the information Stephens actually provided to Cool concerning this exact issue.

The court found this callous disregard for the actual content of Stephens' information irrelevant. Cool's relation of facts to the state court judge via the affidavit for search warrant clearly misrepresented the information that he elicited from Jason Stephens concerning a material aspect of that

information — i.e., its reliability and accuracy.

The statements Cool placed in his affidavit for search warrant were more likely to create probable cause than the statements Stephens actually made to Cool. At a minimum, this constitutes reckless disregard for the truth or falsity of the statements used in the affidavit under *Franks v. Delaware,* 438 U.S. 154 (1978). Thus, the statements contained in the affidavit for search warrant relating to Jason Stephens should be stricken from the affidavit for purposes of determining if probable cause existed.

B. False averment: Officers smell marijuana

The court held that Petitioners failed to meet their burden on the *Franks* issue concerning the officers' ability to smell marijuana. The trial court discounted the inability of immature plants to emit odor marijuana, which produces a bud at maturity, has no smell until it begins that maturation process; comparable to a lily, rosebush or peach tree which does not emit odor until the lily pod, rosebud or the peach blossom forms and prepares to bloom.

On the night officers came to the Black residence, David Croshaw was present and smelled manure,. not marijuana. Croshaw had been on the premises almost daily

and he never smelled marijuana growing. Croshaw was familiar with the smell of marijuana because he encountered it in his professional career.

David Stephens was familiar with the scent of marijuana growing both outdoors and indoors under sodium lights. Stephens mowed the Blacks' yard during 1997. Stephens knew that the defendants had an indoor grow operation in the block building but, he did not know that marijuana was growing in the wooden shed. He did not smell anything out of the ordinary for a farm, including marijuana, while on the Blacks' premises.

The meterman never smelled anything that he thought unusual for a farm (i.e., manure, livestock, etc.).

The prosecution and the trial judge relied upon a mythical distinction between the smell of marijuana growing outdoors and marijuana growing indoors under sodium lighting. However, the government's own expert, who estimated his involvement in hundreds of indoor grow operations, identified three types of marijuana and confirmed that all three types share one distinct smell.

Detective Ledford testified that he smelled marijuana from within the police vehicle in front of the carport and shed.

The officers destroyed at least two other marijuana grows that evening and Ledford may have smelled residual marijuana from those earlier busts remaining on the officers' clothing, shoes, or vehicle interior. At least a minutia of common sense and pastoral life experience would dictate that the smell — had one been produced — would have been muted by the overpowering smell of dairy cattle manure. The extremely high ammonia content of dairy cattle manure produces a pungent odor.

The trial court hypothesized that the lights may have been on inside the shed and, if so, that the marijuana would have been "cooking" in essence. The officers' videotape and photographs make clear that the marijuana had never been "cooked". It appeared at all times to be well and carefully maintained by the Blacks, showing no visible evidence of discoloration or wilting.

The Blacks certainly established by a preponderance of the evidence that Cool's statements in the affidavit were false, defy logic and cannot be considered in support of the search warrant. The statements of Cool in the affidavit concerning the officers' ability to smell marijuana should be stricken from the affidavit for purposes of determining

probable cause.

C. False averment: Officers see marijuana

The Blacks also challenged Cool's assertion in the affidavit that officers present at the Black residence were able to see marijuana through a crack in the wooden shed.

David Croshaw, on the premises daily, never saw light emanating from the shed or marijuana growing inside.

Stephens, who mowed the Blacks' lawn, was unaware that the defendants had marijuana growing in the shed, even though he knew that marijuana was growing in the block building. Once again, the court ignored all credible and logically-sound evidence in favor of upholding the search warrant at any cost.

Officers pinpointed the front right-hand corner of the shed as the exact location where they claimed to have seen marijuana growing inside while seated in a vehicle in the driveway immediately in front of the carport. The police made a videotape of the premises beginning in the early morning hours of June 12, 1997. After securing the scene and returning with a search warrant, they also created photographs of the various structures and their contents. Detective Ledford admitted that Government Exhibit 3, a photograph of

the shed taken by officers in the wee hours before morning light on June 12, 1997, shows neither light nor visible marijuana in the front right hand corner of the shed. Most importantly, the light and marijuana which officers claim to have seen was observed from an unlawful vantage point in the Blacks' driveway, directly behind their house in front of the carport.

Black identified the same location on the police videotape from June 12, 1997, where horse weeds are clearly visible growing around the ***outside*** of the shed, but no marijuana and no light can be seen. The video and photographs taken by officers on the night of the search depict a concrete lintel propped up against the right side of the shed but there is clearly no crack in the wall of the shed.

It is quite obvious from the videotape taken by police officers during the early morning hours of June 12, 1997, that officers either fabricated the statement about marijuana being visible inside the building or they were extremely reckless with regard to the truth or falsity of that statement. Had the officers not been reckless, or anxious to find illegal activity, or whatever it was that prompted them to say they saw marijuana, they might have realized that what they saw, if

anything, was horse weeds between the concrete lintel and the clearly distinguishable side of the shed.

The court further based its conclusion on a reverse hypothesis (the court earlier hypothesized the lights were on inside and cooking the marijuana) that the lights may have been turned off at the time the video was taken. However, the court disregarded that the lock was still on the door to the shed, meaning that officers had not been inside yet to turn off the lighting apparatus projecting the light officers claimed to see.

D. False Averments by Others

False statements contained in the affidavit for search warrant are not shielded because the affiant-officer is unaware that those statements are false. To do so would permit law enforcement officials to "launder" false information by passing it along to the affiant in an effort to prevent suppression under the *Franks* standard:

> . . . [W]hen the [person providing information] is himself a government official, a deliberate or reckless omission [or false statement] by the informant can still serve as grounds for a *Franks* suppression . . . Otherwise, the government would be able to shield itself from *Franks* suppression by deliberately insulating affiants from

> information material to the determination of probable cause." *U.S. v. Wapnick*, 60 F.3d 948, 956 (2nd Cir. 1995).

The *Wapnick* court's reasoning applies here. Whether Cool knew the statements contained in his affidavit were false is irrelevant so long as other officers from whom he gathered the independent investigation knew, or were reckless with regard to its veracity. The affiant in this case actually **knew** no facts and performed none of the independent investigation — which makes his application for search warrant all the more reckless.

The Blacks demonstrated conclusively to the court that there was no crack, no visible light, and no visible marijuana in the shed. This Court's preceding statements on probable cause refer to a "common sense" determination or evaluation of facts. The courts below went to illogical and extreme lengths to salvage the probable cause determination in this case. For this reason alone, the case merits review by this Honorable Court.

V. The writ should issue based upon this Court's decision in *Kyllo v. United States*.

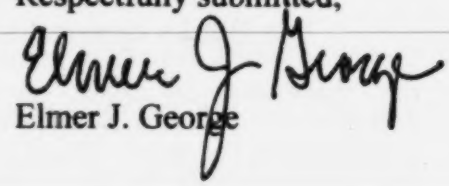
The trial court erred in its ultimate conclusion that the thermal imager survey herein was reasonable and, thus, posed

no violation of the Fourth Amendment protections against unreasonable searches. The appellate court in turn avoided the issue by declining to address it. This issue has recently been decided in favor of the Blacks' argument by this court in last term's K*yllo v. United States*, (No. 99-8508)(2001). Accordingly, the appellate decision affirming below should be reversed under *Kyllo*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,



Elmer J. George

NOT FOR PUBLICATION

No. 99-6117

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
FRANKLIN JOHN BLACK;
CATHERINE ISSACS (now) BLACK
Defendants-Appellants.

_____/

BEFORE: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges.

PER CURIAM. In this appeal following remand, Defendants Franklin John Black and Catherine Black appeal the district court's denial of their motion to suppress. Defendants argue that (1) police used observations obtained unlawfully from within Defendants' curtilage in obtaining the search warrant, (2) the warrantless use of a thermal imaging device violated the Fourth Amendment, and (3) the court erred in ruling that Defendants had not met their burden of proof under *Franks v. Delaware*, 438 U.S. 154 (1978), with respect to three challenged statements in the affidavit used to

obtain the warrant. The United States argues that even if Defendants' Fourth Amendment rights were violated, the evidence obtained pursuant to the warrant is sheltered from exclusion by *United States v. Leon*, 468 U.S. 897 (1984). We **AFFIRM**.

I.

During 1997, Detective Mark Cool of the Kentucky State Police ("KSP") was investigating indoor cannabis operations in Boyle County, Kentucky. On June 11, 1997, Jason Stephens, who was suspected of operating an indoor cannabis facility, informed Detective Cool that he had obtained marijuana from "John and Cathy,"[1] who also operated an indoor facility on their Tank Pond Road property.

Detective Cool contacted Sheriff Karl Lutrell of the Boyle County Sheriff's Office and learned that marijuana-related complaints had been made about john and Cathy Black, who lived in the Tank Pond Road area. Detective Cool also contacted Trooper George Canter of the KSP who

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At various points in the record, Defendant Cathy Black is referred to as "Kathy" or "Kathy Black." For purposes of consistency, she is referred to in this opinion solely as "Cathy" or "Cathy Black."

confirmed that he had received similar complaint concerning Defendants. Finally, Detective Cool spoke with Detective Rick Ledford of the KSP, who, using information provided by the DEA, confirmed that Cathy Black had purchased equipment commonly used in indoor marijuana production.

That night, Detective Cool sent officers to Defendants' rural residence for further investigation. Defendants' house, which sits about one-fourth of a mile from their property line, is reached by Chestnut Grove, a private road. Past the house, a two or three car-length driveway intersects Chestnut Grove and leads to a carport. Beyond the driveway, Chestnut Grove runs to the shed which was the subject of the officers' investigation. The shed is approximately five feet from the carport, at least fifty feet from the house, and three to five feet from Chestnut Grove. Chestnut Grove continues past the shed to the next tract of land, but consists only of two trenches worn by the tires of vehicles.

When the officers dispatched by Cool arrived at Defendants' property on June 11, 1997, they parked their vehicles on Chestnut Grove near the carport. Thus, the officers were within approximately five feet of the shed, but over fifty feet away from the house. The officers then made several observations from their vehicles. First, a bright light emanated from within the shed, and Trooper Tony Perkins, Trooper George Canter, and Detective Ledford testified that they could see marijuana plants through a crack in the wall of

the building. Detective Ledford and Trooper Perkins, who were both familiar with marijuana odor, also testified that they could smell marijuana from the vehicle. Finally, a thermal imaging survey revealed significant amounts of heat escaping from the shed.

The officers secured the scene and obtained a search warrant. The affidavit in support of the warrant contained the information obtained from Stephens, as well as the confirmation by Boyle County authorities and Trooper Canter that marijuana-related complaints had been lodged against Defendants. It stated that DEA records confirmed that Defendant Cathy Black had purchased equipment used for growing marijuana indoors. An attachment to the affidavit also recited the officers' observations upon arriving at Defendants' residence, and the results of the thermal imaging survey. The ensuing search produced a total of 620 marijuana plants inside two out-buildings on Defendants' property.[2]

On August 7, 1997, a federal grand jury returned a three-count indictment against Defendants. Count One charged them with manufacturing over one hundred marijuana plants. Count Two charged them with aiding and abetting in the possession of marijuana with intent to

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Plants were located in the shed observed by the officers, as well as on the second floor of a "block building" used to store farm equipment, which was situated within five feet of the shed, approximately at the point where Chestnut Grove disintegrated into "two ruts."

distribute. Count Three sought the forfeiture of Defendants' real property.

On August 15, 1997, Defendant pleaded not guilty to the charges. On September 2, 1997, Defendant filed a joint motion to suppress. The court denied the motion, and shortly thereafter Defendant sought to change their plea. On the day of their re-arraignment, Defendants filed a supplemental motion to suppress and a motion to reconsider, which the court subsequently denied. Defendants then entered conditional guilty pleas to Counts One and Two, and agreed to forfeit the property set forth in Count Three. On January 16, 1998, Defendants were each sentenced to thirty months' imprisonment under the safety valve provision of 18 U.S. C. § 3553(f).

On May 11, 1999, this court vacated the district court's order denying Defendants' motion to suppress and remanded the case for an evidentiary hearing. *United States v. Black*, No. 98-5155, 1999 WL 357759 (6th Cir. May 11, 1999)(unpublished per curiam). We reasoned that Defendants were entitled to a hearing on essentially five issues: (1) whether Jason Stephens' tip had been misrepresented by the police in the application for a search warrant, (2) whether the officers present at the Black residence actually smelled marijuana from their vehicles, (3) whether the officers actually saw marijuana plants through a crack in the wall of the shed, (4) whether the officers made their observations from within the curtilage of the home, and (5) whether the

thermal scan of the shed violated Defendants' Fourth Amendment rights. *Id.* At *3-4.

The district court held an evidentiary hearing on July 30 and August 3, 1999. Subsequently, the court denied Defendants' motion to suppress in a written Opinion and Order. The court concluded that (1) Defendants' Fourth Amendment rights had not been violated because the portion of Chestnut Grove from which the officers made their observations was not part of the curtilage of Defendants' residence, and (2) Defendants had not met their burden under *Franks* of establishing that the information in the affidavit was knowingly false or made with reckless disregard for the truth. Notably, the court also concluded that the even without the thermal imaging evidence, the facts contained in the affidavit were sufficient to justify the warrant. Therefore, the court did not consider whether the use of the thermal imager itself violated Defendants' Fourth Amendment rights.

II.

A.

We first address Defendants' contention that the court erred in denying their motion to suppress because the police used unlawful observations made from within the Defendants' curtilage in procuring the search warrant. Defendants argue that the officers' observations from Chestnut Grove, including the thermal image scan, were made from within the curtilage of their home, which by definition is the area "so intimately tied to the home itself that it should be placed under the

home's 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). If the observations were made from within the curtilage, Defendants assert that these observations were illegal, and therefore tainted the affidavit. Defendants assert, under the "fruit of the poisonous tree" doctrine, that this taint requires suppression of the evidence gathered in the search conducted pursuant to the warrant.

We reject Defendants' argument, and we note in so doing, we need not even reach the question of whether the officers' observations came from within the curtilage of Defendants' home. Rather, under the fruit of the poisonous tree doctrine, the question we must address is whether, despite any impermissibly tainted factual averments in the affidavit, the warrant nevertheless issued upon probable cause.[3] *United*

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The contours of probable cause have been established by Supreme Court precedent, and have been dutifully explored by other panels within this Circuit. Our task is to determine whether, under the totality of the circumstances, the state court judge had a substantial basis for concluding that "a search would uncover evidence of wrongdoing." *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000)(quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). In reviewing the affidavit, we do not look for "magic words," and we judge it based "on the adequacy of what it does contain, not what it lacks, or on what a critic might say we should have added." *United States v. Allen*, 211 F.3d 970, 974 (6th Cir. 1999). Stated differently, the judge must "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge"

States v. Herrold, 962 F.2d 1131, 1138 (3d Cir. 1992); *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987)(holding that "[t]he mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant. . . . A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant"). If probable cause did exist even without consideration of the challenged observations, then Defendants' argument fails.

This Court reviews a district court's factual findings on a motion to suppress for clear error, and its conclusions of law *de novo*. *United States v. Leake*, 998 F.2 1359, 1362 (6th Cir. 1993). Although we owe no particular deference to the conclusions of the district court, which sat as a reviewing court, we must pay "great deference" to the state judge's findings, which "should not be set aside unless arbitrarily exercised." *Id.*, at 1362-63 (quoting *United States v. Pelham*, 801 F.2d 875, 877 (6th Cir. 1986)(citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). "'[L]ine-by-line scrutiny [of an

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of persons supplying the hearsay information,' probable cause exists." *King*, 227 F.3d at 740 (quoting *Gates*, 462 U.S. at 238).

underlying affidavit is] . . . inappropriate in reviewing [a state judge's] decisions'." *United States v. Allen*, 211 F.3d 970, 972 (6th Cir. 2000)(quoting *Gates*, 462 U.S. at 230, n. 14). Notwithstanding, the state judge must have been neutral, detached and more than a mere rubber stamp for the police. *United States v. King*, 227 F.3d at 739 (citing *Aguilar v. Texas*, 378 U.S. 108, 111 (1964)).

Here, apart from the challenged observations, the affidavit included the tip provided by Jason Stephens, who was under investigation for growing marijuana indoors. As described in the affidavit, Stephens stated that he had "obtained" marijuana from "John and Cathy," who grew marijuana indoors at their Tank Pond Road area residence. In *Allen*, 211 F.3d 970 (6th Cir. 1999), this Circuit recently addressed the role that an informant's tip may play in the probable cause determination. In such cases, we must examine factors which, although not "'separate and independent requirements to be rigidly exacted in every case,'" should be weighed in assessing the value that should be afforded to the tip. *Allen*, 211 F. 3d at 973 (quoting *Gates*, 462 U.S. at 230). "These factors, which consist of the 'veracity' or 'reliability' as well as 'basis of knowledge' of the tip, are relative where the strength of one factor may compensate for the deficiency of another." *King*, 227 F.3d at 740 (quoting *Gates*, 462 U.S. at 230-32). In other words, "[the] determination does not lend itself to the application of '[r]igid legal rules,' and no one decision may serve to provide

a definitive basis upon which to rely inasmuch as 'informant's tips, like all other clues and evidence . . . may vary greatly in their value and reliability.'" *King*, 227 F. 3d at 739 (quoting *Gates*, 462 U.S. at 232). At bottom, based on the information presented, the judge must be able to independently determine probable cause; his determination cannot merely ratify the "bare conclusions" of others. *Id.; Allen*, 211 F.3d at 975.

Although Stephens was not named in the affidavit, he was described as a "suspect" of the ongoing investigation. Thus, it was clear to the reviewing judge that Stephens was known to the affiant, and that his tip bore more indicia of reliability than if it had been made anonymously. Additionally, it is significant for purposes of veracity and reliability that in the process of implicating Defendants, Stephens made statements against his own penal interest. *United States v. Southern*, No. 99-1736, 2000 WL 1769633, at *4 (6th Cir. Nov. 16, 2000)(unpublished). We think that such statements are inherently more truthful and reliable than statements which do not implicate the informant.

In addition the indicia of reliability inherent in Stephens' tip, we also note that it was corroborated by independent police investigation. Detective Cool contacted Sheriff Lutrell and Trooper Canter, both of whom confirmed that they had received "complaints" that John and Cathy Black, who lived in the Tank Pond Road area, had been cultivating marijuana indoors. Although no specific complaints were identified, the mere confirmation that a

"John and Cathy" lived in the Tank Pond Road area lends some credibility to Stephens' information. Moreover, Detective Cool contacted Detective Ledford, a specialist in indoor marijuana operations who corroborated Stephens' tip against information provided by the United States Drug Enforcement Agency, which indicated that Cathy Black had previously purchased equipment used for the indoor production of marijuana.

Given the totality of the circumstances, we find on these facts a substantial basis for concluding that a search would uncover evidence of wrongdoing even without consideration of the officers' observations at Defendants' residence prior to obtaining the warrant. Although Defendants claim that Stephens' information was not "first hand," this alone is not dispositive for purposes of a probable cause determination, which may be based entirely on hearsay, so long as a substantial basis exists for crediting the hearsay. *Jones v. United States*, 362 U.S. 257, 269-70 (1960); Fed. R. Crim. P. 41(c)(1)(stating that a warrant may issue based on hearsay in whole or in part). Taking into consideration Stephens' tip, which went against his own penal interest and was corroborated by the local sheriff and another Kentucky State Police officer, as well as information supplied by the DEA, the state judge had a substantial basis for crediting Stephens' tip, and could independently determine probable cause. Therefore, the district court properly determined that the fruit of the poisonous tree doctrine does not require

exclusion of the evidence obtained from Defendants' property pursuant to the warrant. As a result, we decline to address the United States' argument that the officers are entitled to good faith immunity under *United States v. Leon*, 468 U.S. 897 (1984).

B.

Next, we consider whether the court erred in concluding that Defendants failed to demonstrate, under *Franks*, 438 U.S. 154 (1978), that the information in the affidavit supporting the warrant was knowingly false or made with reckless disregard for the truth. A defendant must prove this assertion by a preponderance of the evidence. *Id.* at 156. If the burden if satisfied, then the false information is extracted from the affidavit and the remaining information is reexamined to determine whether, under the totality of the circumstances, a finding of probable cause is still supported. *Id.*

Defendants make three separate arguments concerning the *Franks* hearing: (1) that Detective Cool lied in the affidavit about the "tip" he had received from Jason Stephens; (2) that the officers lied about smelling marijuana from their vehicle; and (3) that the officers lied about seeing marijuana through a crack in the wall of the shed.

Because we have concluded that the affidavit supported a finding of probable cause even without consideration of the information gathered at the Defendants' residence, we need only address Defendants' argument that

Detective Cool lied in the affidavit about the "tip" he had received from Jason Stephens. Specifically, as noted above, the affidavit stated that Stephens had "obtained" marijuana from individuals known to him only as "John and Cathy," who were growing marijuana indoors on their property located in the Tank Pond Road area. Later, however, Stephens testified that the affidavit misrepresented the information he had given to the police. Stephens maintained that he never told Cool that he had actually "purchased" marijuana from Defendants, but only that he had obtained marijuana from someone who obtained it from "John and Cathy" in the Tank Pond Road area. Thus, Defendants assert that Cool lied about the nature of the evidence, inasmuch as the affidavit characterizes it as "first-person" knowledge rather than "second-hand" knowledge. Defendants also point to the police report, which states that Stephens admitted to having "purchased" marijuana from "John and Cathy" within the last week.

The district court concluded that, for *Franks* purposes, there was no discernible difference between "obtaining" marijuana directly from "John and Cathy" via sale or gift, and smoking marijuana with someone else who had obtained it from them. The court noted that "either way Jason Stephens possessed marijuana once owned by 'John and Kathy.'" Thus, the court concluded that Defendants had not established that the statement was knowingly false or made with reckless disregard.

We affirm the district court on this issue. Nothing in Stephens' testimony is inconsistent with Detective Cool's statement in the affidavit because Stephens had, in fact, obtained marijuana from Defendants. Simply that Detective Cool used the term "purchased" in the police report does not suggest that he lied or recklessly disregarded the truth in the affidavit. Nor do we believe that the mere fact that Stephens may have obtained marijuana from Defendants indirectly, rather than directly, demonstrates that Detective Cool lied or was reckless in drafting the affidavit. Therefore, we affirm the determination that Defendants failed to meet their burden under *Franks*.

C.

Defendants also contend that the mere use of the thermal imaging device, regardless of whether it was used from within the curtilage of their residence, by itself constituted a violation of the Fourth Amendment.4 Because we have concluded that the affidavit was sufficient to establish probable cause even without the information fathered at Defendants' residence, we decline to address Defendants' argument.

III.

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4 On February 20, 2001, the United States Supreme Court heard oral argument in *Kyllo v. United States*, 190 F.3d 1041 (9th Cir. 1999), *cert. Granted*, 121 S. Ct. 29 (Sept. 26, 2000)(No. 99-8508), a case which squarely presents the Fourth Amendment implications of thermal imaging. Because we have decided the case at bar on other grounds, we need not issue a stay pending the outcome of *Kyllo*.

Therefore, we **AFFIRM** the judgment of the district court.

HARRY W. WELLFORD, Circuit Judge, **concurring**:

This is a difficult case which has occupied a district judge and concerned this court over a considerable period of time. It involves a close question regarding the extent of curtilage in a rural area, probable cause for the issuance of a search warrant, and other issues concerning the legality of a search of rural outbuildings by Kentucky police.

I. CURTILAGE

Defendants challenge the observations and thermal imaging conducted by police officers in the course of their investigation of defendants because allegedly they took place within the curtilage of the defendants' home prior to issuance of the contested search warrant. I would affirm the district court's analysis of this issue, first to the effect that the relevant portion of Chestnut Grove Road used by the officers to make the observations was not within the curtilage. Thus, evidence of the observations made, the smelling of marijuana, and thermal imaging from the road did not take place within the curtilage, and were therefore properly taken into account by the judge issuing the warrant. Although the issues are close, I find no error in this curtilage determination by the district judge.

II. PROBABLE CAUSE (APART FROM THERMAL IMAGING)

I concur also in this court's decision that the informer's

tip, especially as a "suspect" in area drug operations, "corroborated by independent police investigation" (apart from thermal imaging), including the officers' observations at the scene, furnished sufficient probable cause under the totality of the circumstances for the state judge's issuance of the search warrant. Apart from the thermal imaging survey by detective Ledford, I conclude that the actions of the officers, as set out by the district court, were: (1) based upon adequate and reasonable police investigation; (2) based upon a totality of the circumstances indicating probable cause to believe that defendant were engaged in an illegal marijuana operation; and (3) were not reckless, arbitrary, flagrant, dishonest, nor even negligent. That much of the information obtained about defendants was based upon hearsay does not render the information unreliable under the circumstances. The affidavit of detective Cool adequately set forth the background circumstances in his affidavit for a search warrant. It described the location of the property to be searched in detail, together with the outbuildings purportedly possessed by defendants. The affidavit was adequate for the judge's determination of probable cause for the search, again apart from any mal imaging utilized.

III. *FRANKS* CHALLENGE TO AFFIDAVIT

After conducting a *Franks v. Delaware*, 438 U.S. 154 (1978), hearing, mandated upon remand, the district court found no demonstrated violation by detective Cool of the Kentucky State Police of the *Franks* requirements. I agree

with our conclusion of the correctness of the district court's finding that the defendants failed to show either "deliberate falsehood or . . . reckless regard for the truth" in the submission of the challenged affidavit. *Franks*, 438 U.S. at 171.

IV. THERMAL IMAGING

The court, in *United States v. Ishmael*, 48 F,3d 850(5th Cir. 1995), considered the government's use of thermal imaging in investigating marijuana production in outbuildings in a remote, rural area. *Ishmael* found the practice to be constitutional, not an unreasonable invasion of privacy in somewhat comparable circumstances to those involved in this case. In that case, the defendant attempted to conceal the marijuana activity, and he, like the Blacks, exhibited subjective expectations of privacy. The Fifth Circuit found no constitutional violation in the use of the thermal imaging device under those circumstances and reversed the district court's suppression of evidence obtained by the use of the device. *Ishmael*, 48 F.3d at 856; *see also United States v. Myers*, 46 F.3d 668 (7th Cir. 1995), and *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994).1 See also the earlier case of *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994), reaching the same conclusion. The Ninth Circuit joined the chorus of agreement on the issues in *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999), *cert granted* 121 S.Ct. 29

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1 The Eleventh Circuit reiterated this result in *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995), noting no contrary authority.

(2000). *Compare United States v. Cusumano*, 67 F.3d 1497, 1504 n. 11 (10th Cir. 1995), *vacated on other grounds*, 83 F.3d 1247 (10th Cir. 1996)(en banc), as noted in *United States v. Elkins*, 95 F. Supp.2d 796 (W.D. Tenn. 2000)(expressing a distinctly minority view).

I am persuaded by the virtually unanimous authority on the thermal imaging issue that the use of this equipment did not violate defendants' constitutional rights with respect to the outbuildings on the subject property. I would add this evidence, therefore, to the other evidence addressed in considering whether there was probable cause for the search under the totality of circumstances.

V. APPLICABILITY OF *LEON*

United States v. Leon, 468 U.S. 897 (1983), decided that "evidence obtained by offers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate" may be admissible in a criminal trial even if "ultimately found to be unsupported by probable cause."2 *Id.* at 900. The Court's opinion in *Leon* considered the tension in such cases between "unreasonable invasions of privacy" and admission of "evidence which exposes the truth." *Id.* at 900-01 (quoting *Olderman v. United States*, 394 U.S. 165, 175 (1969)). Like the instant case, *Leon* included drug involvement of a

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2 The government's petition for certiorari presented the question whether, under the Fourth Amendment, "evidence seized in reasonable good faith reliance on a search warrant that is subsequently held to be defective" should be upheld. *Id.* at 905.

defendant who challenged the basis for the search warrant involved, because it was "devoid of information establishing the informant's reliability" and because the information contained in the affidavit was stale and "these deficiencies had not been cured by police investigation." *Id.* at 904-05.

Leon considered or assessed, in making its analysis as to admissibility of evidence of illicit drug conduct, despite the aforesaid deficiencies in the search warrant process, "the flagrancy of the policy misconduct." *Id.* at 911. It also considered whether in that process the search had been made in "goof-faith reliance" on the warrant, comparable to a good-faith arrest by a police officer based upon his reliance upon an apparently valid statute. *Id.* at 911. *See Michigan v. DeFillipo*, 443 U.S. 31 (1979).

> Reasonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli v. United States*, 393 U.S., at 419. See *Illinois v. Gates*, 462 U.S., at 236; *United States v. Ventresca, supra*, at 108-109.

Leon, 468 U.S. at 914. The issuing magistrate must, however, have "a substantial basis for determining the existence of probable cause; *Illinois v. Gates*, 462 U.S. at 239," *id*, at 915,

looking to the "totality of the circumstances." *Leon* emphasized both that "the exclusionary rule is designed to deter police misconduct" and "the extreme sanction of exclusion." *Id.* at 916. Finally, the Court in *Leon* observed that it was only in the "unusual case" that exclusion of evidence would "further the purposes of the exclusionary rule." *Id.* at 918. Such rule of exclusion "cannot be expected: . . . to deter objectively reasonable law enforcement activity." *Id.* at 919. "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its value." *United States v. Peltier*, 422 U.S. at 539, *quoted in Leon*, 468 U.S. at 919.3

Not only must the officer's conduct be in objective good faith in this situation, his "reliance on the magistrate's probable- cause determination and on the technical sufficiency of the warrant . . . must be objectively reasonable." *Id.* at 922. More than that, the courts must look to whether the officers in this case acted in a "dishonest" or "reckless" fashion in preparing the affidavit in question, or that they could not reasonably have believed there was probable cause to effect the search at issue.

Applying the aforesaid principles from the landmark *Leon* decision, I believe that the evidence obtained of illegal

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3 The Court applied an objective test of the good faith of police officers particularly "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920.

marijuana production in the Black outbuilding should not have been excluded. The following findings of the district court with respect to the actions of the Kentucky police and the issuance of a warrant by Kentucky Judge Shewmaker demonstrate that these actions were taken in good faith and were objectively reasonable.

VI. CONCLUSION

The district court was not in error in overruling defendants' motion to suppress for all of the reasons stated. In addition, I would hold the thermal imaging under the circumstances not to have violated defendants' constitutional rights. Finally, I would hold that the actions of the police met the *Leon* reasonable good-faith standards. Accordingly, I concur in affirming the decision of the district court.

KAREN NELSON MOORE, Circuit Judge, concurring. I would hold that the officers' observations came from within the curtilage of defendants' home. Nonetheless, I agree with the per curiam opinion that we need not resolve that issue, or the question of thermal imaging, in this case. After excising the portions of the affidavit relating to thermal imaging and the officers' observations from the curtilage, I must conclude that the non-tainted averments in the affidavit were adequate under current Sixth Circuit precedents to provide probable cause for issuing the warrant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 97-63

UNITED STATES of AMERICA, PLAINTIFF,

V. **OPINION & ORDER**

FRANK JOHN BLACK
and CATHERINE ISAACS, DEFENDANTS.

* * * * * * * * * * *

This matter is before the Court upon Defendants' motion to suppress the evidence seized from their property on June 12, 1997 pursuant to a search warrant. In support of their motion Defendants present a multi-faceted argument as to why the search violated their Fourth Amendment rights. The parties fully briefed the issues, and in an October 6, 1997 Memorandum Opinion, the Court denied Defendants' motion and made the following findings. First, Defendants' shed, which was subjected to an examination with a thermal imager, is located outside of the curtilage of the home. Second, the warrantless use of a thermal imager device outside of the curtilage does not violate the Fourth Amendment. Third, the information in the affidavit relied on by the Magistrate Judge in issuing warrant was not stale. Fourth, Defendants are not entitled to a *Franks* hearing with

respect to their contention that the information contained in the affidavit is false because they failed to make a substantial preliminary showing that Kentucky State Police (KSP) Detective Mark Cool knew the information was false or provided it with a reckless disregard for the truth. Fifth, the warrant was of sufficient particularity. In addition the Court found that even if the disputed items are extracted from the affidavit, the warrant was based on sufficient probable cause, which precluded the need for a *Franks* hearing.

Defendants appealed and the Sixth Circuit reversed and vacated the opinion. According to the Court of Appeals, in the absence of the disputed material in the affidavit, the warrant was not supported by probable cause. Further, the Court of Appeals determined that a *Franks* hearing is required with respect to three portions of the affidavit because Defendants made a substantial showing that false statements were knowingly or recklessly included by the affiant. The remainder of this Court's rulings were affirmed. Upon remand, this Court conducted a *Franks* hearing and an evidentiary hearing on the curtilage issue.

I. Factual Background.

During 1997, Detective Cool was investigating indoor cannabis operations in Boyle County. On June 11, 1997, Jason Stephens, one suspected of such activity, informed Cool that he obtained marijuana from "John and Kathy" and that they were growing marijuana indoors on their property. Cool

then contacted Boyle County authorities and learned that complaints had been made that "John and Kathy Black" were involved in such activities. Trooper Canter of the Kentucky State Police informed Cool that he also had received similar complaints concerning Defendants. Cool then contacted Detective Ledford of the Kentucky State Police, who confirmed information provided be the DEA that Defendant Isaacs had purchased equipment used to cultivate marijuana.

At approximately 11:00 p.m. that same day, Cool directed officers to go to Defendants' residence for further investigation. Defendants' Property is located at the end of Chestnut Grove Road near Parksville, Kentucky. Upon arrival, Detective Ledford could smell marijuana and Sgt. Meadows observed bright light coming from a shed. Two other officers stated that they could see marijuana plants through a large crack in the shed's wall. These observation were made from the officers' vehicles. Detective Ledford then conducted a thermal imaging survey of the shed from the vehicle and observed significant heat escaping. This information is included is Cool's affidavit in support of the search warrant.

Pursuant to the execution of a warrant issued by Judge Stephen M. Shewmaker, police seized various articles associated with an indoor marijuana growing operation.

II. *Franks* hearing.

Defendants claim that the information in Cool's

affidavit was knowingly false or made with a reckless disregard for the truth I accordance with the principles articulated in *Franks v. Delaware*, 438 U.S. 154 (1978), Defendants bear the burden of proving this assertion by a preponderance of the evidence. If the defendant satisfies this burden, then the false matter is extracted from the affidavit. If the remaining material fails to support a finding of probable cause in light of the totality of the circumstances, then the evidence must be suppressed. *Id.* As will be discussed, the Court finds that Defendants have failed to carry their burden with respect to each disputed item.

a. Jason Stephens.

Defendants offered the testimony of Jason Stephens, who had previously pled guilty in this Court to growing marijuana, to show that the following statements are false: that Stephens "obtained" marijuana from individuals known to him only as " John and Kathy" and that they were growing marijuana indoors on their property. Stephens was arrested by Cool at 7:00 p.m. in Boyle County on the same day the investigation of Defendants culminated. He was questioned by Cool earlier that day near his residence but provided no information. After his arrest, he was taken to the residence of William Faulkner, another suspected of growing marijuana, and remained in or near Cool's cruiser for the next two to three hours.

According to Stephens, he felt pressured into

providing information out of fear of losing his farm. When questioned about his knowledge about Defendants, Stephens testified that he never told Cool that he purchased marijuana from John Black and Kathy Isaacs. He did testify, however, that he smoked some marijuana with another individual who said he obtained it from "John and Kathy." He testified further that he had not seen either defendant for several years and was not familiar with Chestnut Grove Road despite living in the area his entire life. Stephens also testified that he told Cool that he had "heard" that Defendants ran a large scale grow operation.

Based on this testimony, the Court finds that Defendants have failed to meet their burden with respect to the information in the affidavit attributable to Jason Stephens. The affidavit material related to "obtaining" marijuana from a "John and Kathy" is not shown to be false in light of the testimony. There is no discernible difference, for the purposes of this exercise, between obtaining marijuana, via a sale or gift, directly from "John and Kathy" and smoking marijuana with another who obtained it from them. Either way, Jason Stephens possessed marijuana once owned by "John and Kathy." Therefore, Defendants have failed to meet their burden.

Defendants' attempt to impeach Cool does not undermine this finding. Although Cool did not take notes contemporaneously with this conversation, and the police

report he prepared some time after the execution of the warrant may contain inconsistencies, Stephens' own testimony establishes that the conversation was accurately described in the affidavit. Accordingly, this portion of the affidavit may be considered in determining whether the warrant was based on probable cause.

b. The ability to smell marijuana.

Next, Defendants argue that the portion of the affidavit wherein Cool states that Detective Ledford could smell marijuana from his vehicle near the shed is false. In support thereof, Ms. Lisa Watson, paralegal for counsel for Defendants, testified that the shed stands between three and five feet from the read. Although Watson has received no training in horticulture or law enforcement and has never encountered a growhouse operation, she testified that Ledford could not have smelled marijuana because the plants discovered in Defendants' growhouse had not reached the level of maturity at which they would emit an odor.

Defendants also offered the testimony of David Croshaw, a neighbor and close friend of Defendants for most of his life. He visited the Defendants on several occasion to watch basketball games on television and eat dinner. He testified that during these visits, Defendants smoked marijuana but he did not. He visited the Defendants on several occasion to watch basketball games on television and eat dinner. He testified that during these visits, Defendants

smoked marijuana but he did not. He also stated that he " could not recall" if he ever entered the shed while it was used as a growhouse. On several occasions, and in the early evening on June 11, 1997, Croshaw entered a two-story block building located near the shed while feeding Defendants' animals. Defendants stored farming supplies on the first floor and, as it turned out, marijuana in the second floor. According to Croshaw, he did not smell marijuana while in or near the block building because he could only smell manure. He also stated that on the next day, while the officers executed the warrant and tossed the marijuana plants from the shed onto the lawn, Croshaw could not smell the marijuana though seated only fifteen feet away. Croshaw had smelled marijuana in the past when he once came upon some growing in a cornfield.

Defendants also called Mr. Rick Ledford, the KSP detective whom cool claimed smelled marijuana near the shed. Ledford is no longer with the state police put now serves as Fire Chief of the City of Radford. He testified that as the police vehicle passed Defendants' carport, which after review of the videotape the Court finds is fifteen feet from the shed,[1] he could smell marijuana.

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Although there was varying testimony regarding the distance between the shed and the house, the shed and the carport, and the carport and the house, a review of the videotape of the search reveals that a police cruiser is parked between the shed

In light of the testimony, the Court finds that Defendants have failed to carry their *Franks* burden. The execution of the search warrant revealed that the small shed was equipped with a number of large 400-watt sodium light bulbs and an exhaust fan. There is no indication, however, that the block shed was not subject to the same conditions as the plants in the shed. This, coupled with the fact that Croshaw could only smell manure from where he was standing, explains why Croshaw was unable to smell marijuana from the shed. Further, there was no testimony in any form that earlier that evening Croshaw stood where Ledford was while under similar conditions.

With respect to Watson's testimony, the Court gives

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and the carport. The tape also shows that there is ample distance on each side of the cruiser between it and the buildings. Based on this proof, the Court finds that the shed is fifteen feet from the carport.

it little weight. Watson is not trained in the relevant discipline and has had no experience with sophisticated growhouse operations. In addition, Defendants failed to establish that at the time of the investigation, the sodium lights were off. Therefore, if the lights were on, then the large number of plants in the shed were in essence "cooking." Common sense seems to dictate that under those conditions, the plants would emit an odor regardless of their maturity.

The Court considers the testimony of Mr. Ledford credible, and the proof offered by Defendants is insufficient to undermine his account of his observations on June 11, 1997. Accordingly, Defendants have failed to show that the "smell" portion of Cool's affidavit is false.

c. The ability to see the marijuana.

Defendants also argue that the information in the affidavit related to officers' ability to see light coming from a large crack in the shed and to actually see marijuana through the crack is false.

Ledford and KSP Officer Perkins testified that on the night in question, a bright light was shining through a crack in the lower right hand corner of the shed's front wall. The officers also stated that from their vehicle they could see marijuana plants. Defendants offered a videotape taken of the shed on the night of September 1, 1997. In an attempt to recreate the scene as the officers allegedly viewed it, Watson videotaped the shed while Black was inside holding a lamp

with a 100-watt light bulb near the ceiling. According to Defendants, the videotape shows that no light is able to escape the shed. In addition, Isaacs and Watson testified that as of June 11, 1997, the shed was lined with a product called Celotex, and foam padding was stuffed into the shed's corners and eaves.

Defendants also offered a videotape taken during the day and photographs of the shed taken on July 28, 1999, to show that the shed is composed of wood and framed by two-by-fours. The left and right sides of the shed as well as the back are covered by tin sheets arranged horizontally. The front is not covered with tin.

In support of the challenge against the officers' ability to see the plants through the cracks, Isaacs testified that articles stored in the shed precluded observation of anything in the shed through the crack. Defendants also offered a videotape taken from inside of the shed during the search which revealed a coat hanging in that corner and miscellaneous items on the floor.

Having considered the evidence, the Court finds that Defendants have failed to prove by a preponderance of the evidence that the statements in the affidavit were false. First, with respect to light passing through the cracks, the Court is not persuaded that the use of a single 100-watt bulb replicates the 400-watt sodium bulbs. In addition, the nighttime video was taken more than two months after the investigation,

which casts further doubt on the accuracy of the recreation.

Second, and more importantly, the videotape shows that while Black was inside of the shed with the lamp, light was in fact emitted from the shed. This undermines the assertion that no light may pass through the walls of the crudely built twenty-five year old shed. Watson's testimony that this was merely light from the video camera reflecting off of the tin lining the frame of the front of the shed is unpersuasive. This evidence, considered as a whole, does not undermine the veracity of the officers' observation.

With respect to the officers' ability to see the marijuana, Defendants have again failed to meet their burden. It is undisputed that the shed is three to five feet from the road. Defendants offered the readings taken from the shed through the testimony of Jack Samons. Samons testified, in essence, that as heat intensifies, the image on the device becomes whiter. According to Samons, the two-by-fours appear whiter because they are more dense than the walls and, thus, are less able to conduct heat. In contrast, the spaces. The recording taken from the thermal imager also reveals that the most intense heat, or the whitest reading, is found at the lower right corner of the front wall.

Without considering the constitutional propriety of the use of the thermal imager in this case, a videotape of the imager's reading, which was offered by Defendants, tends to show that more heat escapes from the lower right corner than

from anywhere else on the structure. This phenomenon supports a conclusion that there is in fact an opening there. Although Isaacs testified that such observation is not possible in light of the items stored in that corner of the shed, the videotape taken from within the shed during the search makes it clear that the corner is not stocked with goods to the point where observation is impossible. While some items were in the corner, they did not preclude observation to any degree of certainty. Accordingly, the Court finds that Defendants have failed to show that these aspects of the affidavit were false.

Based on the foregoing, Defendants have not proven by a preponderance of the evidence that Cool's affidavit was false with respect to Jason Stephens' statements; Ledford's ability to smell marijuana; and the officers, ability to see light passing through the structure and observe the marijuana through the crack. Therefore, at this point, this information was property included in the probable cause calculus.

III. Curtilage analysis.

What remains at this juncture is the issue of whither the officers' presence on the road that passed in front of Defendants' house, carport and shed violated the Fourth Amendment. If the answer is yes, then the portions of the affidavit related to the officer's ability to smell the marijuana and see the light and the plants may not be considered when evaluating probable cause. On the other hand, if the officers were lawfully on the road, then their observation of the shed,

even if the shed is within the curtilage, is valid. *See Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 601 (6th Cir. 1998). As the Court of Appeals noted in *Daughenbaugh*, "[w]hile the Supreme Court has never required that law enforcement officers ... shield their eyes when passing by a home on public thoroughfares, the officers still must observe the area being searched from a lawful vantage point." *Id.* (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). Further, "[w]arrantless naked-eye observations of a home's curtilage [do] not violate the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 304 (1987).

The Fourth Amendment insulates individuals from unreasonable searches and seizures. The Amendment is violated when a warrantless search is conducted in an area in which there is a reasonable expectation of privacy. *Oliver v. United States*, 466 U. S. 170, 178 (1984). The curtilage of the home describes the area surrounding the home in which intimate activities associated with domestic life and privacies of the home occur. *Id.* at 179. Curtilage is the area "so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." *United States v. Dunn*, 480 U. S. 294, 301 (1987). In general, with curtilage comes a reasonable expectation of privacy. Areas that are not curtilage, however, are open fields in which there is no legitimate expectation of privacy. *Oliver*, 466 U.S. at 178. Warrantless searches conducted in open fields are

reasonable. *Id.* "An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Dunn,* 480 U.S. 304.

In *Dunn,* the Supreme Court cited four factors which are to be considered in determining whether an area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whither the area is within an enclosure surrounding the home; (3) the nature of use to which the area is put; and (4) the steps taken to prevent area from being observed by passers-by. *Dunn,* 480 U.S. at 301; *Daughenbaugh v. City of Tiffin,* 150 F.3d 594,598 (6th Cir. 1998). These factors are not to be applied mechanically, however, " but are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn,* 480 U.S. 301.

At this time, a review of the geography is necessary. Defendant's property is located on Chestnut Grove Road (Chestnut Grove), which is reached by traveling on Tank Pond Road in Boyle County. Only a portion of Chestnut Grove is paved ends and turns to gravel as Chestnut Groves runs through two lots owned by David Stephens and David Croshaw. At first blush it appears that Stephens' and Croshaw's respective lots are bisected by Chestnut Grove.

However, the deed to Stephens' property shows that the Stephens/Croshaw property line runs down the middle of Chestnut Grove. Thus, each of them owns half of the gravel road up to Defendants' property. Defendants own property on both sides of Chestnut Grove. The deed to their property does not indicate that the County or anyone else owns this stretch of Chestnut Grove.

A number of witnesses described Defendants' property as a tract which sits atop of a knob. The area is extremely rural. While continuing on Chestnut Grove, one first enters Defendants' property at what appears to be an old open gate. There was no evidence presented indicating that this gate was used at any time during the twenty-plus years Defendants' home is reached after traveling for one quarter of a mile.[2] The front of the home runs parallel to Chestnut Grove and is set back from the road.

Proceeding past the house on Chestnut Grove leads to a carport. The carport is connected to Chestnut Grove by what appears to be a two or three car-length driveway which runs perpendicular between the two. Continuing past the

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The testimony was unclear on this point but it appeared from the daytime video, which was taken from a moving vehicle, that considerable driving time passed from the time the vehicle entered the property to the time the house was reached.

driveway on Chestnut Grove leads to the shed which was the subject of the investigation. The shed is at least fifty feet from the house[3] and only three to five feet from Chestnut Grove. The front of the shed runs parallel to Chestnut Grove. The house, carport and shed are all on the left side of Chestnut Grove. Chestnut Grove continues past the two story block building located on the right side. Defendants maintain the grounds between the house, carport and shed.

Once the block building is passed, the road becomes rougher and consists of only two trenches worn by the tires of vehicles. It is only a short drive from this point to the end of Defendant's property. William May owns the next tract of land. Apparently, his land is rough and undeveloped. It is

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The proof varied with respect to the distance between the shed and the house. Lisa Watson, who videotaped the drive onto the property, testified that the shed is forty feet from the house. She also testified that a huge sycamore tree with a trunk some eight feet in diameter stands just before the shed. In the daytime video, when the vehicle reached the house, Watson pointed out the sycamore tree. Despite the tree's vastness, the tree appeared smaller on the video than one might expect at a distance of forty feet. In Defendants' brief filed in support of its motion, they report a distance of 100 feet between the house and shed. In light of these inconsistencies, the Court finds that the shed is at least fifty feet from the house.

also landlocked. At some point, Defendants and May agreed that May would use Chestnut Grove for ingress and egress to his parcel. The landowners also agreed that others wishing to enter May's land for any purpose would first ask John Black for permission.

There is disagreement among the parties as to the nature of Chestnut Grove. Predictably, the government characterizes it as the interstate and Defendants consider it their driveway. In support of its position, the government offered aerial photographs offered by Defendants, however, grass has grown over a substantial portion of Chestnut Grove, indicating only sporadic use. In addition, David Stephens testified that he and Defendants, rather than the County, maintain the road and plow it. Although Boyle County Sheriff Carl Luttrell testified that he has traveled on Chestnut Grove to attend to business on the May property because it is the only way to do so, he also expressed confusion regarding its nature. Luttrell also testified that the County maintains Chestnut Grove beyond Defendants' property line.

Having considered the evidence, the Court finds that the portion of Chestnut Grove which runs through Defendants' property is in fact owned by Defendants. This conclusion is based on a number of considerations. First, the deed to Stephens' property reflects ownership of a portion of Chestnut Grove by he and Croshaw. It is unlikely that an intermediate section of Chestnut Grove is privately owned

while a span of the road further removed from Tank Pond Road is not. Second, there is no dispute that Defendants, rather than the County, maintain the portion of Chestnut Grove which runs through Defendants, rather than the County, maintain the portion of Chestnut Grove which runs through Defendants' property. Finally, Defendants' deed does not indicate ownership by another of the land on which the road sits.

While Chestnut Grove may indeed be private property, calling it a driveway is a misnomer. The area between the building which serves as a carport and Chestnut Grove is the driveway, not Chestnut Grove as a whole, as Defendants suggest. If Chestnut Grove is truly a driveway, then Defendants would have built the carport on it. This configuration would result in Chestnut Grove actually ending at the back of the carport. Defendants opted against this, however, primarily due to the need to use Chestnut Grove beyond Defendants' property line to reach May's property. Further, Defendants did not park their vehicles on Chestnut Grove but instead parked them in the carport off of the road.

A driveway is defined as "a road, especially a private one, leading from a street or other thoroughfare to building, house, garage, etc." THE RANDOM HOUSE COLLEGE DICTIONARY 404 (1st ed. 1980). Thus, the continuous lane of travel running past a number of structures owned by separate individuals that is Chestnut Grove is not a driveway

but a privately owned thoroughfare.

The issue now becomes whether Defendants possessed a reasonable expectation of privacy in the portion of Chestnut Grove which passed in front of their house, carport and shed.[4] This question is answered in the affirmative if the area is deemed curtilage. In light of the four *Dunn* factors, the Court holds that the relevant portion of Chestnut Grove is not within the curtilage. First, while the parties focused on the distances between the structures, only equivocal testimony was offered regarding the distance from the house to Chestnut Grove. In light of the other distances established and the videotape, the Court finds that the house appears to be as far from the road as a batter is from a pitcher; or sixty feet. Distance from the house is not determinative, however, as "there is no fixed distance at which curtilage ends." *Daughenbaugh,* 150 F.3d at 599. As the Court of Appeals for the Ninth Circuit stated in *United States v. Depew,* 8 F .3d 1424, 1427 (9th Cir. 1993), cited by

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In their motion to suppress, Defendants argue that the affidavit is false to the extent that Cool stated that all observations were made from the officers' vehicles. In its Memorandum Opinion, the Court found that Defendants failed to meet their threshold *Franks* burden and the Court of Appeals affirmed this facet of the opinion. Therefore, this exercise only requires consideration of whether chestnut Grove, rather than he driveway, is curtilage.

Defendants, "a distance of 50-60 feet clearly does not compel a finding of curtilage" but it may support one if other factors support such a finding.

Second, whether the area in question is enclosed by a fence or natural barrier must be considered. Discussion of *Daughenbaugh*, relied upon almost exclusively by Defendants, is helpful. There, the structure at issue was a garage located fifty to sixty yards behind the home. The home was located at the end of the street and flanked to the left by a river which curved around the back or the property. Thus, the lift and rear sides of the property were protected by natural boundaries. The sides of the property along the river were also lined with tall trees and shrubs, obscuring the view of the property from the river. On the right side of the house, trees blocked the neighbor's view into the garage. In addition, a large tree stood in the middle of the backyard and it and the house blocked one's view of the garage from the street. The garage stood eighty to ninety yards from the street. A driveway led from the street, through a carport attached to the house, to the garage. *Id.* At 596. After considering the configuration of the property, the Court concluded that this factor weighed in favor of the homeowner because the garage and backyard were sufficiently blocked from public view by natural barriers. *Id.* at 599.

Here, no reference id made to a fence surrounding the home but rather only to a gate marking the entrance of the

property, which again was never closed. Defendants also point to the "natural boundaries" of the property, emphasizing the numerous fruit and sassafras trees which line Chestnut Grove and the huge sycamore tree which fronts the shed. They also focus on the fact that Defendants do most of their living on top of the knob and as one travels past the buildings, the land drops off sharply. While these features certainly support a finding that the curtilage of this home includes the carport, and the outbuildings, they do not amount to an enclosure around Chestnut Grove. If merely living in a wooded area was dispositive, *Dunn* would be rendered meaningless. Further, the area was not protected from public view. Anyone from Kevin Messer, who read Defendants' electric meter, to a United Parcel Service worker, to someone wishing to gain access to May's land, could easily see the relevant stretch of Chestnut Grove.

In order to enclose a road, one visualizes at least a gate preventing entry. Here, no such gate is in use. Although Defendants painted a picture of a compound consisting of house, sheds and carport isolated from the world by nature's boundaries, Chestnut grove itself was left out of the portrait. Therefore, this factor weights against a finding of curtilage.

Third, the officers had no objective data indicating that the road itself was used for illegal activity. When coming on Defendants' property to investigate, the officers only knew from an information that marijuana had been obtained from

"John and Kathy" and rumors that Defendants were running a growhouse. Information such as this does not by itself satisfy the "use" factor. *See Depew,* 8 F .3d at 1427. Accordingly, this factor weighs in favor of curtilage.

The fourth *Dunn,* factor, steps taken the prevent observation, is where the rubber meets the road. *In United States v. Smith*, 783 F .2d 648 (6th Cir. 1986), decided one year before *Dunn*, police officers entered the defendant's driveway which was considered to be curtilage. In considering the propriety of the entry, the court held that "whether a driveway is protected from entry by police officers depends on the circumstances. The fact that a driveway is within the curtilage of a house is not determinative *if its accessibility and visibility* from a public highway rule out any reasonable expectation or privacy." *Id.* at 652 (emphasis added).

In the post-*Dunn* era, the United States Court of Appeals for the Second Circuit also recognizes that driveways that are "readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants' houses." *United States v. Reilly,* 76 F .2d 595 (2d Cir. 1996)(quoting *Krause v. Penny,* 837 F .2d 595(2d Cir. 1988)). Rather than carving out an exception regarding when entry upon the curtilage is lawful, as the Court of Appeals did in *Smith* the proper analysis in light of *Dunn* is to treat the easy access visitors have to driveways, or

in this case to the privately owned thoroughfare, as a function of the fourth *Dunn* factor.

The evidence presented indicates that other than living in he woods, which in and of itself is insufficient, defendants took virtually no steps at keeping passers-by from observing any part of Chestnut Grove, let alone driving on it. First, as previously discussed, although there is a gate at the entrance of the property, it was never used. Second, John Black not only permitted William May to use Chestnut Grove to gain access to his property, he agreed to let others use the road for this purpose provided they first sought permission. Thu, it was reasonably foreseeable that anyone, police officers included, would drive up to Defendants' house and approach to ask permission. Third, each month Kevin Messer came onto the property to check the meter. While this may seem benign, in *Depew* the court found that the defendant took steps to prevent observation, in part, by reading his own meter and renting a post office box in order to prevent a meter reader and postal worker from entering the premises. *Depew*, 8 F.3d at 1428. Here, Defendants allowed Messer to come onto the property to read the meter, In addition, although Defendants' mail and newspaper boxes are located off of their property, Isaacs testified that they are located there only because the mail and newspaper carriers will not travel on the gravel road, not to avoid detection.

Defendants argue that because the road in general and

the buildings may not be seen by others, their expectation of privacy in the property in its entirety is reasonable. This argument is unremarkable. Under Defendants' theory, every homeowner choosing to reside in the woods could simply build a long and winding driveway and be clothed with Fourth Amendment protection from house to property line. The *Dunn* frame work was specifically designed to proscribe such an outcome.

Defendants also argue that they attempted to exclude others by placing "on trespassing" signs on the road. The videotape confirms the government's position that these signs were placed on fences running parallel to the road to keep others off of the fields therein, not the road. Therefore, this argument lacks merit.

Other than the fortuitous lay of the land, there is nothing reflection Defendants' desire to prevent others from traveling on or observing Chestnut Grove. Therefore, this factor weighs heavily against a finding of curtilage.

Defendants argue that *Daughenbaugh* and *United States* v. *Jenkins*, 124 F.3d 768 (6th Cir. 1997), are on all-fours. In each case, the court held that the area in question was within the curtilage. Nonetheless, these cases are easily distinguishable because in each case, law enforcement officers traversed the backyard and not a private road. Defendants also rely on *Reilly* and *Depew* in support of a finding of curtilage. Although *Depew* involved a real

driveway, as previously noted Depew took drastic steps at preventing others from observing his property. Unlike this case, *Reilly* dealt with the area adjacent to a cottage, not a road. In addition, Reilly did not permit uninvited people on his property, unlike Defendants who extended to May's guests a blanket invitation to use the road, even if only to ask.

Considering all four *Dunn* factors together, the Court finds that the portions of Chestnut Grove used by the officers on June 11, 1997 is not within the curtilage. Accordingly, the information acquired by the officers -- identifying and smelling the marijuana and seeing light escaping a crack in the shed -- was properly considered by the issuing Magistrate Judge because the information was obtained from a lawful vantage point. Considering this information in light of the totality of the circumstances, the Court holds that the warrant was based on sufficient probable cause, even if the thermal imagery data is excluded. Therefore, the Court need not consider whether the use of the thermal imager in this case violated the Fourth Amendment.

Based on the foregoing, **IT IS HEREBY ORDERED** Defendants' motion to suppress evidence is **DENIED.**

This_____day of August, 1991.

S/_____

KARL S. FORESTER, JUDGE

NOT FOR PUBLICATION

No. 98-5155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANKLIN JOHN BLACK;
CATHERINE ANNE ISAACS

Defendants-Appellants.

_____/

BEFORE: WELLFORD, SUHREINRICH, and MOORE, Circuit Judges.

PER CURIAM. Defendants Franklin John Black and Catherine Anne Isaacs, who entered conditional pleas of guilty to charges of conspiracy to manufacture marijuana and possession with intent to distribute marijuana, appeal from the district court's order denying their motion to suppress evidence. We **VACATE** the district court's order and **REMAND** for further proceedings.

I. BACKGROUND

Officers of the Kentucky State Police executed a search of Defendants' residence based on probable cause that Defendants were cultivating marijuana. The search resulted

in the discovery of an indoor marijuana operation. The search warrant was issued based on the affidavit of Detective Mark Cool of the Kentucky State Police. The affidavit contained the following affirmations of fact:

On the 11th day of June, 1997, at approximately 9:00 p.m., affiant received information from/observed: While conducting an investigation of an indoor cannibus [sic] operation located in Boyle County, a suspect of that investigation advised the affiant that he had obtained marijuana from a residence located in the Tank Pond Rd. area from individuals known to him only as "John [and] Kathy" and stated they were growing marijuana indoors at their property. At this time affiant contacted Sheriff Karl Luttrell of Boyle County in regards to these subjects. Sheriff Luttrell advised that he has had complaints of John [and] Kathy Black cultivating marijuana and that these subjects live at the end of Chestnut Grove Rd. Which is adjacent to Tank Pond Rd. Affiant then contacted Tpr. George Canter of the Kentucky State Police. Tpr. Canter has worked on several occassions [sic] throughout Boyle Co. Tpr. Canter advised he also has received complaints in the past of John [and] Cathy Black cultivating marijuana. At this time, your affiant contacted Det. Rick Ledford of the Kentucky State Police. Det. Ledford specializes in the investigation of indoor cannibus [sic] operations. Det. Ledford after checking information provided to him by the U.S. DEA stated that Kathy Black had Previously been purchasing equipment used for the manufacture of marijuana.

The affidavit also incorporated by reference the following information as "Attachment'A"':

On June 11, 1997 at approximately 11:00 p.m. your affiant due to being involved in a current investigation directed Det. Ledford, Sgt. Warren Meadows, Tpr. George

Canter and Tpr. Tony Perkins to go to the residence of John [and] Kathy Black to further investigate the information he had obtained. Upon arrival at the residence and prior to exiting their vehicle, Det. Ledford could smell the odor of marijuana. In addition, Sgt. Meadows stated that he could see a very bright light being emitted from a shed next to the parking shed. Tpr.. Perkins and Tpr.. Canter stated at that time they could see marijuana plants inside of the building through a large crack in the building's wall. This was all prior to the four exiting the vehicle. Det. Ledford at this time immediately began a thermal imaging survey of the residence and outbuildings from the vehicle and observed a very unusual and significant heat signature being omitted from the said shed as well as a two story block building located across the driveway from the shed. Thermal imaging is a passive, non-intrusive device that measures the amount of heat being emitted from the surface of an object. It in no way projects any ray or beam towards the objects being observed. Det. Ledford is a certified operator of this device. At this time Det. Ledford and the other listed officers made an attempt to contact the occupants of the residence by knocking on the door of the home and by calling via cellular phone. These attempts were unsuccessful.

Defendants were charged with the manufacture of over 100 marijuana plants, in violation of 21 U.S.C. § 846; and the aiding and abetting the possession of marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Furthermore, the indictment sought the forfeiture of Defendants' real property pursuant to 21 U.S.C. § 853. Defendants pled not guilty to the charges.

Defendants filed a joint motion to suppress the evidence found during the search. In their motion,

Defendants made a number of arguments challenging the lawfulness of the search. First, Defendants argued that the warrant affidavit contained stale information and lacked sufficient detail regarding the time period within which the reported activity occurred. Second, Defendants contended that the use of the thermal imaging device by Detective Ledford constituted a warrantless search and therefore any information derived from it must be suppressed. Third, Defendants claimed that the warrant affidavit contained false and material statements, which required an evidentiary hearing pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978), and the suppression of all items found in the search. Fourth, Defendants asserted that the good faith exception to the search warrant was so facially deficient in failing to particularize the places to be searched that the executing officers could not have reasonably presumed it to be valid.

Defendants requested that the evidence discovered during the search be suppressed and that the court conduct a *Franks* evidentiary hearing. Defendants also requested an evidentiary hearing on the other issues raised in their motion.

The district court denied defendants' motion to suppress. The court declined to view a videotape proffered by defense counsel on the geographical layout of the residence and the surrounding property. Instead, the district court held that sheds are located outside the curtilage of the home and therefore the use of the thermal imaging device could not have been a unlawful search. Additionally, the court rejected

Defendants' claims that the information in the warrant affidavit was stale and that the search warrant lacked particularity. The court also concluded that Defendants were not entitled to a *Franks* hearing.

Defendants filed a supplemental motion to suppress and a motion to reconsider. In their supplemental motion to suppress, Defendants argued that "Attachment 'A'" of the warrant affidavit was not signed, supported by oath or affirmation, nor incorporated into the warrant affidavit. Defendants also argued that the sheds are located within the curtilage of the home. The district court summarily denied Defendants' supplemental motion to suppress and motion to reconsider.

Defendants entered conditional pleas of guilty to the charges had conditionally agreed to the forfeiture of the property set forth in the indictment. The district court sentenced Defendants each to thirty months imprisonment followed by four years of supervised release. Defendants remained on bond pending the outcome of this appeal.

II. DISCUSSION

Defendants argue that the district court erred in the failing to conduct an evidentiary hearing on a number of matters bearing on the lawfulness of the search. A district court is required to conduct an evidentiary hearing when the defendant alleges that a statement in the warrant affidavit is false and he makes a " substantial preliminary showing" that the false statement was knowingly or recklessly included by

the affiant in the affidavit. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Similarly, a district court is required to hold an evidentiary hearing when the defendant has set forth contested issues of fact that bear upon the legality of the search. *See United States v. Mejia*, 69 F.3d 309, 318 (9th Cir. 1995). In all events, however, a district court can forgo conducting an evidentiary hearing if sufficient content remains to support a finding of probable cause after the contested items are set aside. *See Franks*, 438 U.S. at 156; *Mejia*, 69 F.3d at 318.

Under the above analysis, we conclude that the district court was required to conduct an evidentiary hearing on five of the six matters discussed below. The district court erred in forgoing an evidentiary hearing because probable cause did not exist when the disputed items were removed from consideration. We begin with the allegations of false statements in the warrant affidavit, which are analyzed under the *Franks* standard.

First, Defendants argued that the information provided by the informant; Jason Stephens, that he has purchased marijuana from "John and Kathy" is false. Defendants had advised the district court that Stephens was under indictment for unrelated crimes and refused to sign an affidavit. Defendants also informed the court that Stephens was present pursuant to subpoena and was ready to testify to the falsity of the statement in the warrant affidavit. Nevertheless, the district court did not permit Stephens to testify. Rather, the

court ruled that Defendants had not made the requisite showing under *Franks* because their claim to a hearing was premised solely upon their suspicion that any report indicating involvement with Stephens is false. We disagree with the district court's conclusion because Stephens' testimony may have established the falsity of the statement in the warrant affidavit. Accordingly, we find that Defendants made the requisite *Franks* showing and Stephens should be permitted to testify.

Second, Defendants asserted that the officers could not have smelled marijuana while sitting inside the police vehicle and therefore the statement in the affidavit to that effect must be false.[1] Defendants claimed that common sense compels such a conclusion. Defendants also proffered the affidavit of their neighbor, David Croshaw, which stated that the had been on Defendants' property numerous times and never smelled marijuana. In ruling that Defendants failed to make the *Franks* showing, the district court reasoned that Croshaw's affidavit did not address the condition of Defendants' property on the night of the officers' investigation. We believe the district court erred in placing

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[1] We note that although Defendants did not challenge the veracity of statements made by Detective Cool, a defendant is entitled to an evidentiary hearing if he makes a "substantial preliminary showing" that another officer knowingly or recklessly provided the affiant with false information. *See United States v. Wapnick*, 60 F.3d 948, 956 (2d Cir. 1995).

undue importance on this fact because there is no indication that the condition of the property changed in any material respect from day to day given the nature of the marijuana operation. Croshaw's affidavit is sufficient to establish the requisite showing. As Croshaw actually entered Defendants' property, he may have been in a better position to smell the marijuana than officers sitting inside a vehicle.

Third, Defendants claimed that the officers could not have seen marijuana through a crack in the wall of the shed and proffered a videotape of the shed that would have purportedly demonstrated the absence of the cracks permitting a view inside. The district court declined to view the videotape, stating that it could not accurately reflect the conditions on the night of the investigation because the high-powered lights used by Defendants to grow the marijuana were removed from the shed during the search. Accordingly, the district court held that Defendants failed to meet their burden under *Franks*. We are not quite sure how the district court made such a conclusive ruling without looking at the videotape. Defendants were entitled to a hearing on this issue.

Fourth, Defendants argued that the thermal imaging video indicates that the survey was taken on foot rather than from inside the vehicle, making the statement that the survey was taken from the vehicle false. Defendants proffered the affidavit of defense counsel, Kandice D. Engle, which stated her conclusion that the video appears to have been taken on

foot. The district court ruled that Defendants failed to make the *Franks* showing because the affidavit only established that the place from where the reading was taken was false and not that the results from the survey were false. We agree with the district court. Defendants now assert that a survey conducted from within the vehicle would have detected the heat signature from the transmission, motor, and all other parts of the vehicle that had been recently operated, resulting in an inaccurate survey reading. However, Defendants did not offer any evidence in support of their allegation. The district court therefore did not err in denying a hearing on this matter.

The remaining two matters also bear on the lawfulness of the search. The first involves the location of the sheds with respect to the home. The district court, without viewing the videotape offered by defense counsel, held that the sheds are not located within the curtilage of the home, negating Defendants' claim that the use of the thermal imaging device was an unlawful search under the Fourth Amendment. The nature of the use of the thermal imaging device bears on the legality of the search. Thus, the dispute over whether the sheds are located within the curtilage of the home also bears on the lawfulness of the search and thus an evidentiary hearing was required. In conducting the hearing on remand, the district court should view the videotape of the Defendants' residence and surrounding property.

The second matter involves whether the use of the thermal imaging device constituted a "search" under the

Fourth Amendment. The district court avoided this issue when it held that the sheds are located outside the curtilage of the home. However, if on remand the district court determines that the sheds are located within the curtilage of the home, the dispute over the nature of the use of the thermal imaging device may bear on the legality of the search and therefore a hearing would be required.

Although the district court is not always required to hold an evidentiary hearing when a defendant files a motion to suppress evidence, in the interest of conserving judicial resources, we believe it is good practice to do so. On remand, in conducting an evidentiary hearing on the matters discussed above, the district court's focus should be on whether a "substantial basis" existed, under the totality of the circumstances, for the judicial offer to conclude that there was probable cause to issue the search warrant. *See, e.g., Illinois v. Gates*, 462, U.S. 213, 238 (1983).

Defendants remaining arguments are without merit and therefore we need not address them any further.

III. CONCLUSION

For the reasons stated above, we **VACATE** the district court's order denying Defendants' motion to suppress and **REMAND** for further proceedings consistent with this opinion.

HARRY W. WELLFORD, Circuit Judge, **concurring:**

I concur in the result reached in this case: remand for a necessary suppression hearing. I reach this conclusion for

reasons separate from those expressed by my brother, Judge Suhrheinrich, although I agree in considerable part with his opinion, including his recitation of this case's procedural background.

The case of *Franks v. Delaware*, 438 U.S. 154 (1978), established that if a defendant "makes a substantial preliminary showing" that a false statement was made by a police officer in a warrant affidavit (not by accident or oversight) and if that false statement is necessary to find probable cause, then a hearing must be held under requirements of the Fourth Amendment. *Id.* at 155-156. The controversy in *Franks* was over the veracity of a search warrant affidavit, the same situation that applies in this case. The Supreme Court reasoned that a challenge to the warrant should be allowed, among other reasons, because "[t]he magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations." *Id.* at 169. There must be , however, "a suitable preliminary proffer of material falsity," *id.*, and defendant must show that the false information was made by the officer for reasons other than mere mistake or inadvertence. *See id.* at 171.

Detective Mark Cool identified Jason Stephens as the original source of information about the marijuana on defendants' property, but the officer was not able to give a time when Stephens allegedly purchased the marijuana, nor exactly where he purchased it. Other purported information

about the defendants came from unidentified and non-specific "complaints" received about defendants' marijuana activities.[2] Cool had hearsay knowledge from other police, based on "rumors or complaints, " but "no evidence that [defendants] had done anything." except the asserted information from Stephens. Defendants, however, averred that Stephens denied his alleged role in identifying Defendants as criminal culprits and that Stephens was willing to testify to that under oath in the evidentiary hearing. Indeed, they had subpoenaed Stephens and has him available to testify during the suppression hearing, though the district court refused to hear his testimony. This raises, in my view, a *Franks* issue.

However, an even better basis, in my view, for our remand is the district court's refusal to hold an evidentiary hearing (an altogether different creature from a *Franks* hearing) concerning the thermal imaging and curtilage issues.[3]

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One of the law enforcement sources said he had "heard that Cathy Black was involved in producing marijuana."

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As Judge Suhrheinrich mentioned in his opinion, the defendants offered challenges to the "Attachment A" information submitted with Detective Cool's affidavit, particularly to a purported "thermal imaging" of the residence and outbuildings on the property. Defendants also presented challenges as to whether the outbuildings were within the curtilage of defendants' residence.

Evidentiary hearings are required when the defendant alleges specific, detailed facts which present a substantial claim.[4] *See United States v. Coleman*, 149 F.3d 674, 677 (7th Cir. 1998); *United States v. Glass*, 128 F.3d 1398, 1408-09 (10th Cir. 1997); *United States v. Calderon*, 77 F.3d 6, 9 (1st Cir. 1996); *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (9th Cir. 1995). Rather recently, this court found that a district court should have held an evidentiary hearing on a motion to suppress. *See United States v. King*, 127 F.3d 483 (6th Cir. 1997) (holding that where the district court did not hold an evidentiary hearing before suppressing cocaine on the ground that search of the basement in which it was found exceeded the scope of the warrant to search downstairs unit in two-family home in which the defendants lived, remand was required for determinations as to whether the basement was part of the "downstairs unit" described in the warrant, and whether evidence was admissible pursuant to good-faith exception). There, the court illustrated that when the record has been inadequately developed and contested facts exist, then the proper disposition is to remand for an evidentiary

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It should be noted that this standard is less rigorous than that required for a *Franks* hearing.

hearing, by stating:

> Although it invited the parties to submit supplemental briefs on this issue, the court did not hold an evidentiary hearing. Therefore, the record contains only sparse references to facts essential to the resolution of this issue. For example, the record does not sufficiently describe the exact configuration of the two-family dwelling unit in which defendants lived. nor does it contain facts explaining who has access to the basement and by what means. Without such facts, it is impossible for us to address either the government's contention that the basement was part of the 'downstairs unit' for purposes of the search warrant or that the search of the basement is subject to the [*United States v.*] *Leon* [, 468 U.S. 897 (1984)] exception. Moreover, based on the statements of counsel during oral argument, it is unclear whether defendants have a legitimate expectation of privacy in the building's basement or whether defendants have standing to challenge the search. Because the record is inadequately developed, we cannot determine whether the district court erred in suppressing the evidence seized from the basement. We therefore vacate the suppression order and remand this issue to the district court for an evidentiary hearing and further consideration in light of the concerns raised above.

Id. at 486; see also United States v. Taylor, 13 F.3d 786, 789 (4th Cir. 1994) ("Because the district court did not conduct an evidentiary hearing to resolve the material facts disputes, we vacate and remand to give the district court an opportunity to do so.").

With regard to the thermal imaging issue, it is difficult to say whether the disputed manner and result of thermal imaging in this case was a substantial basis for the state

judge's action in issuing the search warrant. Suffice it to say, this was a strongly contested and novel issue before the court.[5] When one notes that detective Cool, who obtained the search warrant, conceded that he had no technical knowledge about thermal imaging; that the defendants stated that they were prepared to present, on the day of the suppression hearing, an expert on the subject of thermal imaging; and the amorphous state of the law on the questions of whether thermal imaging constitutes a search, *cf. United States v. Kyllo*, 140 F.3d 1249 (9th Cir. 1998) and *United States v. Field*, 855 F.Supp. 1518 (W.D. Wisc. 1994) *with United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995) and *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995), then it becomes clear that an evidentiary hearing should have been held on the matter.

Officer Ledford, who performed the thermal imaging procedure, "went onto the premises" to do it late at night. This may present an additional problem in conjunction with the problem of curtilage, another contested issue, which in my view, warranted an evidentiary hearing. *See generally Daughenbaugh v. City of Tiffin*, 150 F.3d 594 (6th Cir. 1998). This is especially true in light of the fact that the defendants

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The government conceded in its memorandum filed with the district court that the Sixth Circuit "has not yet decided whether the use of a thermal image device constitutes a search pursuant to the Fourth Amendment."

stated that they were prepared to present, on the day of the suppression hearing, a videotape of the premises clearly depicting the property, and witnesses who would "testify as to the scenario at the residence."

Without deciding any of the contested questions raised, I would find these matters, in combination, required the district court to have a evidentiary hearing in this case. It was error, in my view, to overrule defendants' motion without a hearing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 97-63

UNITED STATES of AMERICA, PLAINTIFF,

V. **MEMORANDUM OPINION**

FRANK JOHN BLACK
and CATHERINE ISAACS DEFENDANTS.

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This matter is before the Court pursuant to defendants' motion to suppress evidence seized upon execution of a warrant based in part on information obtained from a thermal imagery device. The parties have fully briefed the issues, and the matter is ripe for review.

I. BACKGROUND

Detective Mark Cool of the Kentucky State Police was investigating indoor cannabis operations in Boyle County. On June 11, 1997, Jason Stephens, one suspected of such activity, informed Cool that he obtained marijuana from "John and Kathy" and that they were growing marijuana indoors on their property. Cool then contacted Boyle County authorities and learned that complaints had been made that "John and Kathy Black" were involved in such activities. Trooper Canter of the Kentucky State Police informed Cool that he also had received similar complaints concerning the Defendants. Cool

then contacted Detective Ledford of the Kentucky State Police, who confirmed information provided by the DEA that the Defendant Isaacs had purchased equipment used to cultivate marijuana.

At approximately 11:00 p.m. that same day, Cool directed officers to go to Defendants' residence for further investigation. Defendants' property is located at the end of Chestnut Grove Road in Parksville, Kentucky. Based on Defendants' description, access to their property is achieved by traveling along the paved portion of Chestnut Grove Road which turns into a gravel drive passing through private property up to a fence and gate with a sign marked "Tree Farm" indicating the beginning of Defendants' property. There is a "NO Trespassing" sign at the juncture of the paved and gravel roads. Upon arrival, Detective Ledford could smell marijuana, and Sgt. Meadows observed bright light coming from the shed. Two other officers stated that they could see marijuana plants through a large crack in the building wall. These observations were made from the officers' vehicle. Detective Ledford then conducted a thermal imaging survey of the residence and the sheds from the vehicle and observed significant heat coming from the shed emitting light. It is upon this information which Cool's affidavit for a search warrant is based.

Pursuant to the execution of a warrant issued by Judge Stephen M. Shewmaker, police seized various articles associated with an elaborate indoor marijuana growing

operation. Defendants now claim that the search violated their Fourth Amendment rights and seek to suppress the seized evidence.

II. Discussion.

Defendants base their motion to suppress on a number of claims. Defendants claim that the affidavit supporting the search warrant failed to establish probable cause. This claim based on two primary theories. First, the information provided to the issuing Judge was stale and lacked sufficient detail regarding the time at which the prior alleged activities occurred. Second, the use of the thermal imagery device constituted a warrantless search in violation of the Fourth Amendment making it improper to use the information to find probable cause.

Defendants also assert that the affidavit contained material false information entitling them to a *Franks*-type hearing. Specifically, Defendants allege that the videotape of the thermal imagery indicates that the process was done on foot rather than from the car as reported in the affidavit. Also, Defendants claim that the information provided by Stephens was relied upon Cool with a reckless disregard for its truth. Finally, Defendants argue that the warrant lacked particularity, making it facially invalid.

a. Is the Use of Thermal Imagery a Search?

Thermal imagery devices have optical sensors which sample heat flow from the object upon which the device is focused. The infrared wavelength portion of the

electromagnetic spectrum of the sample contains energy fields of various frequencies. The infrared portion, however, is not visible to the naked eye because the infrared frequency range is lower than visible light. Heat is within the infrared section and thus may only be viewed by enhancement. The device compares the signature of the heat emanating from the target with the signature for a target which radiates heat uniformly. If the target is radiating heat in an atypical manner, the device will so indicate. *See* Note, *The Prewarrant Use of Thermal Imagery: Has This Technological Advance in the War Against Drugs Come at the Expense of Fourth Amendment Protections Against Unreasonable Searches*, 83 Ky. L.J. 891, 896 (1994-1995).

The Sixth Circuit has not yet decided whether the use of thermal imagery constitutes a search under the Fourth Amendment.[1] While every Court of Appeals, as well as the

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[1] There is some indication, however, that the Sixth Circuit has placed its imprimatur on thermal imagery. *See United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994)(holding that probable cause existed based in part on thermal imagery

Kentucky Supreme Court, considering the issue has held that use of the device did not result in a violation of the Fourth Amendment, how those results were reached varies.

Many of the courts deciding the issue have held that there is no expectation of privacy with respect to heat emanation and thus its observation is not a search. *See United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995); *United States v. Meyers*, 46 F.3d 668 (7th Cir. 1995); *United States v. Robertson*, 39 F.3d 891 (8th Cir. 1994); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994); *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994); *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996). Conspicuously absent from these cases is consideration of the role the "open fields" doctrine plays in this analysis. In *Ford*, the device was used on the ground by officers located on defendant's property thirty-five to forty-five yards from the defendant's mobile home after officers had jumped a locked gate. *Ford* was the proper context for consideration of the open fields doctrine, but that issue was not properly preserved for appeal. Rather, the *Ford* court, like the other circuits, determined that the use of the device did not violate the Fourth Amendment. This result was based on defendant having no reasonable expectation of

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readings).

privacy in the heat waves because the information contained therein does not reveal the intimacies the Fourth Amendment is aimed at protecting. *Ford*, 34 F.3d at 996.

The Courts of Appeals cited above arrive at their holdings by application of the *Katz* two prong test to determine if warrantless search violates one's legitimate expectation of privacy. Under *Katz*, the Fourth amendment is implicated by a warrantless search if (1) the defendant exhibits a subjective expectation of privacy, and (2) society is prepared to recognize such expectations as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). It is the second prong which has precluded use of the device to be considered a search.

In determining whether the Fourth Amendment is implicated by use of thermal imagery, other cases dealing with detection devices must be considered. In *United States v. Knotts*, 460 U.S. 276 (1983), police installed a beeper in a can of chemicals purchased by defendant. The beeper was used to determine the location of suspected drug manufacturing. *Id.* At 277. Monitoring of the beeper while can was in a vehicle revealed that the chemicals were taken to a cabin. *Id.* The court held that Defendant had no reasonable expectation of privacy in the information gained from the beeper, the public roads traveled leading up to a cabin, because the same could have been obtained without the beeper from outside of the cabin. *Id.* At 285. The Court emphasized the importance of the nonuse of the beeper to

reveal information concerning the movement of the can while inside of the cabin but left the issue undecided. *Id.* at 277, 285.

The issue left undecided in *Knotts* was addressed in *United States v. Karo*, 468 U.S. 705 (1984). In *Karo*, a beeper was installed in a can of ether. The beeper was then monitored while inside a private residence to confirm that the ether remained there. The Court held that the monitoring of a beeper in a private residence, a location not open to visual surveillance, without a warrant violates the Fourth Amendment. *Id.* at 714. The significant difference between *Knotts* and *Karo* is the knowledge gleaned from the beeper in *Karo* pertained to the interior of the residence. Information that could not be obtained from "*outside the curtilage of the house.*" *Id.* at 715 (emphasis added).

Although the courts addressing the issue have consistently held that no expectation of privacy exists in the heat emissions, application of *Karo* indicates that a privacy interest does exist. The beeper in *Karo* merely provided binary based information: whether or not the can was in the house. A canine sniff similarly provides a "yes/no" response regarding the presence of drugs but is not a search as additional information regarding the contents of a container subjected to the sniff is not revealed. *United States v. Place*, 462 U.S. 696, 707 (1983); *but see United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985) (holding that canine sniff at apartment door was a Fourth Amendment search). The use of

the thermal device is of similar import in that it is intended to reveal whether or not drug production is at hand.

Another significant feature of beepers is that they present no "gray area" in that a positive response will only reveal the location of that to which it is attached. Similarly, a positive canine sniff by a properly trained dog only occurs when drugs are present. *Id.* Thermal imagery, however, does create a gray area as user interpretation is required. When the device indicates the existence of excessive heat, such information in and of itself does not guarantee that marijuana growth is taking place as other legal activities may give rise to the presence of excessive heat. In *Place,* the absence of the threat of "false positives" was significant in the Court's determination that a canine sniff did not infringe upon reasonable expectations of privacy. With regard to thermal imagery, however, there is a greater potential for error. Thus, the ease with which the circuits have dispelled the existence of a privacy interest in heat emissions is questionable.

The Fifth Circuit in *United States v. Ishmael,* 48 F.3d 850 (5th Cir. 1995) also held that the use of thermal imagery did not violate the defendant's Fourth Amendment rights. Based on various information, including prior aerial use of thermal imagery, DEA agents entered Ishmael's property on foot and canvassed the perimeter of a steel building with the thermal device. Based on the readings and on other information, a warrant was issued. *Id.* at 852.

The Court's approach in *Ishmael* is vastly different

from that of the above mentioned circuits and the Kentucky Supreme Court. The Court considered a less restrictive application of the first prong of the *Katz* test necessary, otherwise that prong would be rendered meaningless. *Id.* (Citing *Myers,* 46 F.3d at 699; *Ford*, 34 F.3d at 995) Under the *Katz* analysis, the Court determined that the defendant did manifest a subjective expectation that their operation would be kept private. *Id.* at 854.[2] This result was reached despite the fact that defendants did not, take every precaution against detection. *Id.*

Once the Court determined that defendants did have an expectation of privacy, it then addressee whether the intrusion upon that interest was reasonable. *Id.* at 855. The Court approached this questions in two steps. First, consistent with the other circuits, it determined that the device did not "intrude in any way into the privacy and sanctity of a home." *Id.* at 856 (quoting *Myers*, 46 F.3d at 669). Second, and most importantly here, the court considered the manner in which the device was used in addressing the reasonableness of the intrusion. *Id.* Because the agents never physically invaded defendant's residential curtilage but rather measured head directly on the outside of a building in an open field, "the *search* was not unconstitutional." *Id.* at 856-57 (citing

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Since the Court did not address the second prong of *Katz,* it is assumed that defendant's subjective expectation is one that society considers reasonable.

Dow Chemical Co. V. United States, 476 U.S. 227, 237 (1986)(emphasis added).[3]

The Fifth Circuit's approach in *Ishmael* results in the use of thermal imagery being a search. Once such use is deemed a search, to pass constitutional muster, it must be reasonable. U.S. CONST. amend. IV. Since the agents in *Ishmael* did not enter the curtilage in taking the readings with the device, the search was reasonable. This result is consistent with the Supreme Court's holdings in *Karo, Knotts* and *Dow Chemical*. It is also appropriate as the thermal device does not *enhance the senses* but instead, like the "beeper" placed inside of the home, allows detection of that which is not otherwise detectable.

In summary, the proper analysis of the

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In *Dow Chemical*, the Court held that the EPA's aerial use of a device mapping camera was constitutional because such use did not reveal intimate details. *Dow Chemical*, 476 U.S. at 238. However, the Court warned that actual physical entry into the enclosed area would raise significantly different questions. *Id.* at 237.

constitutionality of the use of thermal imagery begins with whether the defendant manifested a subjective expectation of privacy which society is willing to accept as reasonable. If this test is met, an expectation of privacy exists and its intrusion is a search. Consequently, it must then be determined whether the search was reasonable.

Here, there are two sheds on Defendants' property. In order to prevent detection of their marijuana growing operations, they locked the shed and covered all of its windows. While they did not go to the extremes of *Ishmael* in building a cement-lined underground laboratory beneath a steel building, they at least manifested an intent to keep their operation covert. Assuming that their subjective expectation of privacy is considered reasonable and the use of the device is deemed a search, the inquiry turns to whether that search was reasonable.

b. Was the device used from within the curtilage?

A determination as to whether the use of the device on Defendants' shed is constitutional turns on whether the area from where the reading was taken is considered the curtilage of Defendants' residence. Individuals do not have a privacy interest in activities conducted outside of the curtilage. *Oliver v. United States*, 466 U.S. 170, 178 (1984). An area is considered curtilage when it is the setting for intimate activities associated with domestic life and privacies of the home. *Id.* at 179. Curtilage is the area "so intimately tied to the home itself that it should be placed under the home's

umbrella of Forth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 301 (1987). Areas that are not curtilage are open fields in which there is not legitimate expectation of privacy. *Oliver*, 466 U.S. at 178.

Four factors are considered in determining whether an area is within the curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature of use to which the area is put; and (4) the steps taken to prevent area from being observed by passers by. *Dunn*, 480 U.S. at 301. Applying these factors here, Defendants' shed was sitting in an area outside of the curtilage. First, while not dispositive, the shed is 100 feet from the home.[4] Second, there is no reference made to a fence surrounding the home but rather only to a gate and fence marking the entrance of the property. Third, there is no indication as to the use to which the area is put. Finally, the area surrounding the shed appears to be readily visible to those off of the property. Although Defendants claim that the "No Trespassing" sign was ignored, Defendants' description of the property indicates that the sign is located at the entrance of a neighboring property, not Defendants' property. In any event, "No Trespassing" signs do not effectively bar the public from viewing open fields in rural areas. *See Oliver*, 466 U.S. at 182. In light of these

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[4] *See Defendants' Memorandum in Support of Motion to Suppress* at 10.

factors, the area on which the shed sits in not within the curtilage of Defendants' home but is an open filed.

The parties dispute whether the reading was taken from a vehicle or on foot. Assuming Defendants' assertion that the reading was taken on foot is true, the search was reasonable. Because the shed is located in an open filed, the officers could virtually proceed right up to the wall of the shed and take the reading without intruding upon Defendants' privacy interests. *See Dunn*, 480 U.S. at 298, 305 (officer looking into windows of barn located in open field held constitutional); *Ishmael*, 48 F.3d at 852 (thermal imagery reading taken immediately outside of building in open field held constitutional). Thus, whether the reading was taken on foot or from the vehicle is irrelevant considering the location of the shed. Consequently, the warrantless use of the thermal device to detect heat emanating from Defendants' shed was reasonable and the information obtained through the device was properly included in the probable cause equation.

c. Was the Information Supporting the Warrant Stale?

The remainder of Defendants' challenges to the issuance of the search warrant are more easily resolved. Defendants assert that the information provided to the Magistrate was stale as it did not pertain to events close in time to the search. Alternatively, Defendants argue that the information contained in the affidavit lacked sufficient detail regarding the time period within which the alleged activity

occurred.

In measuring whether the issuance of a warrant was based on probable cause, the Court does not conduct a *de novo* review of the issuing judge's finding. Instead, the Court determines whether there is substantial evidence supporting the finding of probable cause. *Massachusetts v. Upton*, 466 U.S. 727, 732-33 (1984). Probable cause means that there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause is not measured by rigid formulae but rather in light of the totality of the circumstances. *Upton*, 466 U.S. at 732 (citing *Gates*, 462 U.S. at 238).

As the United States correctly points out, there is no specific time at which information intended to be sued to support the issuance of a search warrant becomes stale. *United States v. Canan*, 48 F.3d 954 (6th Cir. 1995). Rather, the probable cause determination is a function of the inherent nature of the crime. *Id.* at 959. If the activity in question is of a protracted or continuous nature, time is less significant. *Id.* Even if significant time has passed since a defendant's last reported criminal activity, it may be inferred that indicia of such activity will remain for some time. *Id.* (citations omitted). Thus, whether the information upon which probable cause is based has grown stale depends on the nature of the reported activity.

Here, the Magistrate Judge's probable cause

determination was based in part on (1) prior complaints of marijuana cultivation made to the Boyle County sheriff; (2) Stephens' report that he purchased marijuana from Defendants and observed them growing it; (3) Trooper Canter's reference to reports of cultivation activity; and (4) Defendant Isaacs' prior purchase of cultivation equipment. The activities at issue here and the acts underlying the information provided are continuous in nature. An elaborate marijuana cultivation operation is not an overnight activity but rather spans a significant amount of time. Thus, it was properly inferred that indicia of the illegal activity reported remained. Accordingly, the information was not stale. In addition, although no specific time at which these events occurred was provided, the information was properly included among that used to form a substantial basis for the issuing judge's finding of probable cause.

d. Is Defendant Entitled to a *Franks* type hearing?

Defendants claim that Cool made false statements in his affidavit, entitling them to an evidentiary hearing. Such a hearing is required if Defendants make a substantive preliminary showing that the affiant's statement was deliberately false or made with reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154 (1978). Defendants face an extremely heavy burden in this regard. *See United States v. Cummins*, 912 F.2d 98, 101 (6th Cir. 1990). First, the defendant must point to specific false statements and make a substantial showing that they were made intentionally or with

reckless disregard for the truth. *Id.* These allegations must be accompanied by an offer of proof and supporting affidavits. *Id.* Once there requirements are met, a determination must be made regarding whether there is sufficient evidence to support a finding of probable cause without the challenged material. *Id.* If probable cause still exists, then the defendant is not entitled to a hearing. *Id.*; *United States v. Campbell*, 878 F.2d 170, 191 (6th Cir. 1989).

Defendants point to four statements in Cool's affidavit that they claim are false or made intentionally or with reckless disregard for the truth. First, Defendants argue that the information provided by Stephens that he purchased marijuana from "John and Kathy" is false. Defendants base this argument on Defendants' immediate suspicion that they never sold marijuana to this individual.

With respect to Stephens' statement, Defendants have not made a substantial showing that the statements made in the affidavit were intentionally false or made with a reckless disregard for the truth. Defendants attempt to base their claim for a *Franks* hearing merely upon their suspicion that reports of their prior dealings with Stephens are false. While Defendants may questions the veracity of Stephens, without more they have failed to meet their burden.[5]

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Assuming *arguendo* that this statement was intentionally false or made with reckless disregard for the truth, if it is extracted, the other information provided by Cool supports a finding of probable cause.

Second, Defendants challenge the officers' ability to smell marijuana emanating from Defendants' property while in their vehicle. Defendants attempt to offer an affidavit of their neighbor, Mr. David Croshaw. Croshaw states that he has been on Defendants' property on numerous occasions and has never smelled marijuana. In this respect, Defendants have also failed to meet their burden as Croshaw's statement goes to the condition of Defendants' property when he was on it and not on the night in question.[6] Thus, his statement does

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At the suppression hearing, Defendants stated that Croshaw was on Defendants' property at 7 p.m. on the night in question and did not smell marijuana. While this information is inexplicably absent from Croshaw's affidavit, it still fails to impeach the officers' observations later that evening. In fact, defendants' interjection of this fact strengthens the officers' account. They claim that Croshaw was on property to tend to

not substantially show that the affidavit contained statements that were intentionally false or made with reckless disregard for the truth.

Third, Defendants contend that statement regarding the officers' ability to see marijuana plants inside of the shed through a crack is false. They offer videotape taken by Lesa Watson, defense counsel's paralegal, showing that no such crack enabling the officers to view the inside or the shed exists. The government argues that the tape does not accurately reflect the conditions on June 11, 1997 as during videotaping the shed was not illuminated with the 400 watt lights used by the officers when they their observation. As a result, the tape does not reflect the shed as seen by the officers. Accordingly, Defendants have also failed to carry their burden with respect to this statement.

Finally, Defendants claim that the thermal imaging video indicates that the readings were taken on foot rather than from the vehicle, making the statement that they were

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defendants' animals and amidst the manure he could not smell marijuana. However, the to hinder their sense of smell. Therefore, even with this additional fact, Defendants fail to carry their burden.

taken from the vehicle false. The affidavit or defense counsel Kandice D. Engle is used to support this claim. Notwithstanding the obvious problems associated with counsel playing dual roles, removal of this statement does no prohibit the use of the imagery data. Defendants only assert that the place from where the reading was taken was false, not that the information provided by the device was false. Thus, assuming that defendants have made a substantial showing that the statement made was intentionally false or made with reckless disregard for the truth, only the statement made was intentionally false or made with reckless disregard for the truth, only the statement as it relates to the location or the survey is removed. Once removed, Defendants fail to clear the second hurdle of the *Franks* analysis as it has been determined that a reading taken from outside or the shed on Defendants' property did not violate Defendants' Fourth Amendment rights. Consequently, the device readings remain and there exists a substantial basis form probable cause.

In conclusion, Defendants have not sustained their burden with respect to alleged false statements in Cool's affidavit. Accordingly, their request for a *Franks* type hearing is denied.

e. Did the Warrant Lack Particularity?

If a warrant is so facially deficient in failing at particularize the places and persons to be searched that the executing officers could not reasonably presume its validity a search pursuant to it is invalid. *United States* v. *Leon*, 468

U.S. 897, 913 (1984). Defendants claim that because the warrant called for the search of all vehicles and persons present at the residence at the time of execution, the warrant lacks the requisite particularity and is not valid. In addition, defendants argue that no probable cause existed to support a search of the vehicles and persons.

The facial defects alleged by defendants which would render the warrant invalid do not exit as the warrant clearly describes the places to be searched. Defendants' home along with vehicles and persons present at the time of execution, equally fails to support suppression. . Through their experience, DEA agents have learned that the fruits of drug operations appear in a number of places. *See e.g.,* *United States v. Martin,* 920 F .2d 393, 399 n. 7 (6th Cir. 1990). Associated with illegal substance operations are various items having evidentiary value such as chemicals, money, firearms, records, ledgers, scales, telephone numbers, and various household items. *See Id.*

Here, the knowledge gained by Cool, from thermal imaging and other sources supporting the issuance of the search warrant with respect to the shed, also supported the search of those other laces. Consequently, the inclusion of Defendants' home and vehicles and persons present on the property as places to be searched does not render the warrant facially invalid.

III. Conclusion.

In conclusion, based on the totality of the

circumstances, there existed substantial evidence to support a finding of probable cause. Therefore, the issuing judge's finding should be left undisturbed.

Accordingly, **THE COURT HEREBY ORDERS** that Defendants' motion to suppress [DE #22] is **DENIED.**

This_____day of October, 1997.

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KARL S. FORESTER, JUDGE